91-1993

No. ——

SUPREME COURT, U.S.
FILED
JUN 11 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FIBREBOARD CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether it was proper, under the due process clause and other applicable legal principles, to apply Texas law to determine the scope of coverage under an insurance contract, where the insured is a California company that produced the relevant products in California, the insurance contract was negotiated, issued and performed in California, and the parties must have expected that California law would apply when they entered into the contract in 1957?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	5
I. THE COURTS BELOW PLAINLY ERRED IN HOLDING THAT THE CONSTITUTION ALLOWED APPLICATION OF TEXAS LAW TO DETERMINE WHETHER PETITIONER WAS OBLIGATED TO INDEMNIFY RESPONDENT FOR PUNITIVE DAMAGES	6
A. Applicable Law	6
B. The Ruling in this Case	9
II. STATE AND FEDERAL COURTS ACROSS THE COUNTRY NEED CONSTITUTIONAL GUIDANCE BECAUSE THEY ARE RENDERING INCONSISTENT CHOICE-OF-LAW DETERMINATIONS THAT FREQUENTLY FRUSTRATE THE REASONABLE EXPECTATIONS OF THE PARTIES	15
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924) 12
Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) ..... *passim*
American Home Assur. Co. v. Safway Steel Prods. Co., 743 S.W.2d 693 (Tex. App. 1987) 3, 4, 13
American Re-insurance Co. v. Insurance Comm'n, 527 F. Supp. 444 (C.D. Cal. 1981) 9
American Trucking Ass'ns, Inc. v. Smith, 110 S. Ct. 2323 (1990) 9
California Ass'n of Highway Patrolmen v. Department of Personnel Admin., 185 Cal. App. 3d 352, 229 Cal. Rptr. 729 (1986) 10
Cimino v. Raymark Indus., Inc., Civil Action No. 86-0465-CA (E.D. Tex. 1990) 3
City Products Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979) 11
Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964) 7, 14
CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 739 F. Supp. 710 (D.R.I. 1990) 17, 18
Detroit Edison Co. v. Pacific Ins. Co., 742 F. Supp. 287 (M.D.N.C. 1990), *aff'd*, 944 F.2d 901 (4th Cir. 1991) 18
Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984) 10
E.I. Dupont De Nemours & Co. v. Admiral Ins. Co., No. 89C-AU-99, 1991 WL 236943 (Del. Super. October 22, 1991) 18
G. Heileman Brewing Co. v. Royal Group, Inc., No. 88 Civ. 1041 (JFK), 1991 WL 120366 (S.D.N.Y. June 21, 1991) 16
Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 603 A.2d 61 (N.J. Super. 1992) 17
Goad v. Celotex Corp., 831 F.2d 508 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) 8
Gombos v. Ashe, 322 P.2d 933 (Cal. 1958) 11
Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934) 7, 10
Home Ins. Co. v. Dick, 281 U.S. 397 (1930) 7, 14

TABLE OF AUTHORITIES—Continued

Page

In re Asbestos Ins. Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. Ct. Jan. 24, 1990) 11
Interinsurance Exchange v. Ohio Cas. Ins. Co., 373 P.2d 640 (Cal. 1962) 10
Jones Truck Lines v. Transport Ins. Co., No. Civ. A 88-5723, 1989 WL 49517 (E.D. Pa. May 10, 1989) 16
Jordan v. Consolidated Mut. Ins. Co., 59 Cal. App. 3d 26, 130 Cal. Rptr. 446 (1976) 10
Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 390 S.E.2d 562 (W. Va. 1990) 18
Manriquez v. Mid-Century Ins. Co., 779 S.W.2d 482 (Tex. App. 1989) 3
McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578 (8th Cir.), *aff'd mem.*, 454 U.S. 1071 (1981) 8
National Starch & Chem. Co. v. Great Amer. Ins. Co., 743 F. Supp. 318 (D.N.J. 1990) 18
Payne v. Tennessee, 111 S. Ct. 2597 (1991) 8
Peterson v. Superior Court, 642 P.2d 1305 (Cal. 1982) 3
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 5, 6, 7, 8
Potomac Elec. Power Co. v. California Union Ins. Co., 777 F. Supp. 968 (D.D.C. 1991) 18
Reich v. Purcell, 432 P.2d 727 (Cal. 1967) 4
Robert McMullan & Son, Inc. v. United States Fidelity & Guaranty Co., 103 Cal. App. 3d 198, 162 Cal. Rptr. 720 (1980) 12
Sangamo Western, Inc. v. National Sur. Corp., 414 S.E.2d 127 (S.C. 1992) 17
St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc., 777 P.2d 1259 (Kan. 1989), *cert. denied*, 493 U.S. 1036 (1990) 17
Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) 8
Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954) 14
Wheeling v. Financial Indem. Co., 201 Cal. App. 2d 36, 19 Cal. Rptr. 879 (1962) 9

TABLE OF AUTHORITIES—Continued

Page

W.R. Grace & Co. v. Continental Cas. Co., 896 F.2d 865 (5th Cir. 1990) 4, 13, 18
W.R. Grace & Co. v. Hartford Accident & Indem. Co., 555 N.E.2d 214 (Mass. 1990) 18

Constitutional & Statutory Provisions:

U.S. Const. art. I, § 10 8
Cal. Civ. Code § 1646 (West 1985) 3
Cal. Ins. Code § 533 (West 1972) 11
Texas. Ins. Code Ann. art. 21.42 (Vernon 1981) 12, 13

Other Authorities:

Gilchrist, *Insurance Coverage for Pollution in the United States and the United Kingdom: Covering Troubled Waters*, 23 Case W. Res. J. Int'l L. 109 (1991) 16
Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L. J. 1 (1986) 10
Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041 (1987) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ——

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FIBREBOARD CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Continental Casualty Company seeks review of a decision of the United States Court of Appeals for the Ninth Circuit applying Texas law to make petitioner liable for more than $300 million in punitive damages awarded against respondent, a California asbestos manufacturer.[1]

---

[1] Continental Casualty Company, an Illinois corporation, is a wholly owned subsidiary of CNA Financial Corporation. Eighty-three percent (83%) of CNA Financial Corporation is owned by Loews Corporation. Continental Casualty has no non-wholly owned subsidiaries. The only parties in the court below were Continental, Fibreboard Corporation, and Pacific Indemnity Company, which had been denied intervention in the district court and lost a separate appeal on that issue.

OPINIONS BELOW

The court of appeals affirmed a ruling of the United States District Court for the Northern District of California in a short order expressly adopting the reasoning of the district court. The affirmance (Pet. App. A) is reported in a table located at 953 F.2d 1386. A petition for rehearing with suggestion for rehearing *en banc* was denied (Pet. App. C). The opinion of the district court (Pet. App. B) is reported at 762 F. Supp. 1368.

JURISDICTION

The court of appeals entered judgment on January 16, 1992. The petition for rehearing was denied on March 13, 1992. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

The Ninth Circuit in this case held that Texas law applied to an insurance contract dispute in California between an Illinois insurer and a California insured, even though the insurance contract was negotiated, issued and performed in California and California law unquestionably would have applied when the contract was executed. Because this choice-of-law ruling utterly disregards the reasonable expectations of the parties and thereby subjects petitioner to unforeseeable liability for a huge award of punitive damages, it raises very serious due process concerns that warrant consideration by this Court.

The insurance contract at issue in this case is a general liability policy issued by petitioner Continental Casualty Company to respondent Fibreboard Corporation in May

1957. Fibreboard cancelled the policy in March 1959. In 1990, Fibreboard was held liable to a class of more than 2,300 plaintiffs in Texas for manufacturing defective asbestos products and marketing those products without proper warnings. (*Cimino v. Raymark Indus., Inc.*, 86-0456-CA (E.D. Tex.)). The jury awarded punitive damages totalling more than $300 million.

In the wake of these events, petitioner filed this diversity action against Fibreboard in the U.S. District Court for the Northern District of California, seeking a declaratory judgment that it was not liable under the 1957 policy for the punitive damages awarded against Fibreboard in Texas.[2] Continental then filed a summary judgment motion, relying on the California rule barring insurance coverage for punitive damages. *See Peterson v. Superior Court*, 642 P.2d 1305, 1310-11 (Cal. 1982). Fibreboard responded that the applicable law should be that of Texas, where the *Cimino* plaintiffs all resided. Texas courts have permitted insurance coverage for punitive damages. *See American Home Assur. Co. v. Safway Steel Prods. Co.*, 743 S.W.2d 693 (Tex. App. 1987); *Manriquez v. Mid-Century Ins. Co.*, 779 S.W.2d 482 (Tex. App. 1989).

In arguing for application of California law, petitioner pointed to a number of relevant factors. First, Fibreboard at all relevant times had its headquarters and asbestos-manufacturing facilities in California, and the insurance policy was negotiated and issued in San Francisco. In 1957, when the policy was issued, these facts would have mandated that a California court apply California law. *See* Cal. Civ. Code § 1646 ("A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a

---

[2] Continental also sought a declaration that it was not liable for punitive damages awarded against Fibreboard in a West Virginia state court. The district court's reasoning in addressing that claim does not implicate the due process concerns discussed here, and therefore Continental is not seeking review of the district court's determination as to the West Virginia claims.

place of performance, according to the law and usage of the place where it is made.").[3] In addition, petitioner argued that California had a strong continuing interest in applying its law on this issue to maximize deterrence of aggravated torts committed by its residents and to maintain a coherent and foreseeable set of regulations applicable to insurance policies issued in the state. Fibreboard responded that Texas had evinced a countervailing interest in applying its law to maximize recoveries by its residents and to protect companies doing business in Texas from uninsured punitive recoveries, citing *American Home Assur. Co. v. Safway Steel Prods. Co., supra.*[4]

The district court agreed with Fibreboard, denying summary judgment for Continental and entering judgment for Fibreboard. The court first found that there was a true conflict between California law and Texas law, Pet. App. 19a, and then proceeded to apply California "governmental interest" choice-of-law analysis, Pet. App. 19a-27a; *see Reich v. Purcell*, 432 P.2d 727, 729 (Cal. 1967). In resolving this conflict in favor of Texas law, the district court reasoned in essence that California had no significant interest in applying California insurance law to deter wrongful conduct causing injury outside its

---

[3] As we note *infra*, similar principles would at that time have mandated the same outcome in other courts around the country.

[4] Petitioner noted, however, that the validity of these Texas interests was dubious in light of a recent Fifth Circuit decision refusing to apply *Safway* (and the Texas statute on which *Safway* was based) in a case involving a non-Texas insurer and a non-Texas asbestos manufacturer whose products were used in Texas. Mem. in Support of Summary Judgment, at 17-18 (citing *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865 (5th Cir. 1990)). In that case, as petitioner pointed out, the Fifth Circuit stated that "extraterritorial" application of Texas law to the insurance dispute would "raise serious questions of constitutionality under the Commerce Clause as well as the due process clause of the fourteenth amendment." *W.R. Grace & Co.*, 896 F.2d at 883 (*per curiam* opinion on petition for rehearing).

borders. According to the court, therefore, California law and public policies would suffer only minimal impairment by the application of Texas standards regarding the insurability of punitive damages. Pet. App. 20a-22a. The court also concluded that Texas had substantial interests in compensating plaintiffs that would be greatly impaired by the application of California law prohibiting insurance for such punitive damages. Pet. App. 22a-23a.

Continental appealed the district court's judgment to the United States Court of Appeals for the Ninth Circuit. That court, without issuing an opinion of its own, simply affirmed "[f]or the reasons set forth by the District Court."[5] Pet. App. 2a. A timely petition for rehearing with suggestion for rehearing *en banc* was denied. Pet. App. 30a.

REASONS FOR GRANTING THE WRIT

This case exemplifies a general problem that has arisen as courts face a huge volume of litigation over insurance coverage for toxic torts and environmental clean-up costs at a time when state-law tests for choice of law have come to be based on some form of balancing of the relevant state interests. These state-law tests have been treated in many cases as a license to select whatever state law maximizes the liability of insurers. In this process, the actual and justifiable expectations of the parties to the insurance contracts, regarding the applicable state law and the scope of the coverage being provided, are frequently ignored.

This Court has indicated that a key factor, in determining whether application of a particular state's law to a contract dispute satisfies due process, is the reasonable expectation of the parties. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985). *See also Allstate*

---

[5] The Ninth Circuit's order indicated that it was "not for publication."

Ins. Co. v. Hague, 449 U.S. 302, 327 (1981) (Stevens, J., concurring in the judgment); *id.* at 333 (Powell, J., dissenting). It is apparent, however, that this message is not being heeded—perhaps because *Shutts* was such an extreme case on its particular facts. Thus, while some courts have indeed recognized the need to respect the expectation of the parties that an insurance contract would be governed by the law of the single state where the contract was signed and the insured was based, many others in comparable situations have refused to do so—even to the point of applying the laws of a multitude of states to a single contract depending on the locus of each particular injury.

It follows that there is a compelling need for this Court to examine once again the role that the due process clause plays in assuring that choice-of-law decisions comport with fundamental fairness. Moreover, this case would provide a fully appropriate vehicle for such an examination. As we show *infra*, there could be no clearer example of the application of formless "interest balancing" to reach a result that wholly contravenes the understanding of the parties to a contract as to the applicable law and thereby subjects one party to a category of liability that it never could have considered at the time the contract was signed.

I. THE COURTS BELOW PLAINLY ERRED IN HOLDING THAT THE CONSTITUTION ALLOWED APPLICATION OF TEXAS LAW TO DETERMINE WHETHER PETITIONER WAS OBLIGATED TO INDEMNIFY RESPONDENT FOR PUNITIVE DAMAGES.

A. Applicable Law.

This Court has long recognized that the due process clause of the Fourteenth Amendment imposes limits on the ability of a court to apply the law of a given state to a particular case. *See, e.g., Phillips Petroleum Co. v.*

Shutts, 472 U.S. at 818-23; *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930). In contract cases, during the first half of this century, the Court's decisions tended to reflect the prevailing state-law rule of *lex loci contractus*—requiring application of the law of the state where the contract was made. *See, e.g., id.* at 407-10; *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149-50 (1934), *explained in Allstate Ins. Co. v. Hague*, 449 U.S. at 308 n.11 (plurality opinion). Later, the Court recognized that the Constitution may permit the application of the law of more than one state in a given case, and adopted an approach authorizing choice of the law of any state that has sufficient "contacts" with a particular dispute. *See Allstate Ins. Co. v. Hague*, 449 U.S. at 307-08 (plurality opinion); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 181-83 (1964).

In *Allstate*, however, four of the eight participating Justices took the view that a state "contact" may be weighed in the due process analysis only to the extent that it is validly linked to the underlying constitutional concerns. In particular, they emphasized that a "contacts" analysis cannot justify an outcome that denies a party fundamental fairness under the due process clause by defeating its justifiable expectations about the law that would govern a contract. *See* 449 U.S. at 327 (Stevens, J., concurring in the judgment) (preventing "unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause"); *id.* at 331 ("an unanticipated post-accident occurence is clearly irrelevant for due process purposes"); *id.* at 333 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) ("The touchstone here is the reasonable expectation of the parties.").

More recently in *Phillips Petroleum Co. v. Shutts*, a case involving enforcement of leases for natural-gas production, the Court as a whole recognized the importance

in the constitutional analysis of respecting the parties' reasonable expectations about the applicable state law. It held that in "considering fairness in this context, an important element is the expectation of the parties." 472 U.S. at 822 (citing Justice Powell's dissent in *Allstate*). The Court went on to note that there was "no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control." *Id.* *See also* *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) ("[P]etitioner could in no way have been unfairly surprised by the application to it of a rule that is as old as the Republic.").[6]

The reasons for adopting such an approach are clear. The due process clause requires that courts act with fundamental fairness to all parties. In contract cases, "fairness" largely depends on whether application of a given rule of law upsets the settled expectations of the parties that formed the basis of their prior commercial agreement. This principle is reflected in the constitutional prohibition of statutory impairment of contracts. U.S. Const. art. I, § 10. The significance of this fairness concern has also been recognized by this Court in various other contexts. *See, e.g., Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are

---

[6] Courts of appeals have recognized the significance of this aspect of the Court's rulings in *Allstate* and *Shutts*. *See, e.g., Goad v. Celotex Corp.*, 831 F.2d 508, 513 (4th Cir. 1987) ("Unfair surprise is at the heart of the due process restrictions on state choices of law . . . . To subject a party's conduct *post hoc* to rules that that party had no reason to expect might apply might truly be unfair."), *cert. denied*, 487 U.S. 1218 (1988); *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 582 (8th Cir.) ("When parties' expectations are rationally based upon one state's laws, or in the negative, when their rational expectations are *not* based upon the laws of some other state, it violates due process to breach those expectations by applying the unexpected law."), *aff'd mem.*, 454 U.S. 1071 (1981).

involved . . . ."); *American Trucking Ass'ns, Inc. v. Smith*, 110 S. Ct. 2323, 2334 (1990) ("In determining whether a decision should be applied retroactively, this Court has consistently given great weight to the reliance interests of all parties affected by changes in the law.").

B. The Ruling in this Case.

Despite this Court's prior decisions in this area, the courts below wholly disregarded the clear evidence of the expectations of the parties concerning the law that would apply to the insurance contract. They employed a choice-of-law analysis that neither party could have anticipated when the contract was signed. The result was that petitioner was forced to provide indemnity for a category of loss—punitive damages—that it could not have considered when it was negotiating the terms of the contract. In so ruling, these courts deprived petitioner of the fundamental fairness guaranteed under the due process clause.

Thus, when this contract was entered into in 1957, it would have been inconceivable that a California court would apply Texas law to any aspect of its interpretation or enforcement. At that time, California courts interpreted Civil Code section 1646 as directly mandating that California law govern all contracts (like this one) that were performed or entered into within the state. *See Wheeling v. Financial Indem. Co.*, 201 Cal. App. 2d 36, 40-42, 19 Cal. Rptr. 879, 882-84 (1962).[7] Moreover, this California rule reflected the *lex loci contractus* principles that prevailed in 1957 in almost every other state in the union

---

[7] As noted above, section 1646 flatly requires application of California law to contracts made or performed in the state. More recent California decisions have nevertheless held that the statute need not be read literally. *See American Re-insurance Co. v. Insurance Comm'n*, 527 F. Supp. 444, 451 (C.D. Cal. 1981) (citing cases). If this change had been accomplished legislatively, parties like petitioner would have had a strong claim under the contract clause.

(including Texas[8])—and indeed were then viewed as constitutionally compelled.[9] The clear predominance of such principles nationwide, "almost universally accepted as gospel a quarter of a century ago," Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041, 1044 (1987), inevitably reinforced the belief that California law would govern the contract, regardless of where suit to interpret or enforce it was ultimately brought.

In this regard, we note that, under California law, parties to a contract are presumed to have "had existing law in mind when they executed their agreement," *California Ass'n of Highway Patrolmen v. Department of Personnel Admin.*, 185 Cal. App. 3d 352, 364, 229 Cal. Rptr. 729, 735 (1986), and it is "well settled that insurance policies are governed by the statutory and decisional law in force at the time the policy is issued," *Interinsurance Exchange v. Ohio Cas. Ins. Co.*, 373 P.2d 640, 643 (Cal. 1962); *Jordan v. Consolidated Mut. Ins. Co.*, 59 Cal. App. 3d 26, 37, 130 Cal. Rptr. 446, 452 (1976). As a result, there was no need for the parties here to include any special provision in order to assure that California law would govern the interpretation and enforceability of the insurance contract.[10] Nor was there any

---

[8] *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

[9] *See Allstate Ins. Co. v. Hague*, 449 U.S. at 308 n.11 (plurality opinion). In 1957, the governing decisions from this Court included *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, *supra*. There, the fidelity bond at issue "contemplated that the employee whose faithfulness was guaranteed might be in any state," and, "at the date of loss," that employee, the obligor and the obligee were all in the forum state—Mississippi. 292 U.S. at 149. The Court nonetheless held that neither the provision of nationwide coverage nor the occurrence of a loss in Mississippi provided any basis, under the due process clause, for application of Mississippi law to affect the rights of the parties, since the contract had been signed in Tennessee. *Id.* at 150.

[10] To the contrary, as numerous courts have recognized, *see* p. 17 *infra*, the assumption that California law would govern this

need to include an express exclusion of coverage for punitive damages—at a time when such coverage was expressly barred by virtue of a California statute, Insurance Code § 533, that was understood to be an implicit part of every California insurance contract.[11]

Any doubt here about the parties' actual expectations concerning choice of law is dispelled by their subsequent behavior. In 1979, several asbestos manufacturers, including Fibreboard, sued their insurers in California state courts, seeking to establish their right to coverage under the various policies. These cases were consolidated and trial proceedings extended over eleven years, until final judgment was entered on January 24, 1990. *In re Asbestos Ins. Coverage Cases*, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. Ct.). Although the issue of Continental's liability to Fibreboard for punitive damages was not litigated in these proceedings,[12] it is

---

contract reflects the common understanding in the commercial community.

[11] *See* Cal. Ins. Code § 533 (barring insurance coverage for a "willful act"); *Gombos v. Ashe*, 322 P.2d 933, 939 (Cal. 1958) ("[i]n order to warrant the allowance of [punitive] damages the act complained of must not only be wilful, in the sense of intentional, but it must be accompanied by some aggravating circumstance, amounting to malice"). The district court was simply incorrect in giving weight to the fact that the first California decision specifically barring insurance coverage of punitive damages was in 1979. Pet. App. 24a (citing *City Products Corp. v. Globe Indem. Co.*, 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979)). The *City Products* ruling was based in part on Insurance Code § 533, which, as noted, was in force in 1957. *See* 88 Cal. App. 3d at 36-39, 151 Cal. Rptr. at 497-98. It is thus spurious to suggest that "the law at the time of contracting allowed insurance of punitive damages," Pet. App. 26a, or that "Continental should have foreseen that they might be required to pay any punitive damages for which Fibreboard might become liable," Pet. App. 24a. Notably, there has never been a single California case at any time authorizing insurance coverage of punitive damages.

[12] In a separate agreement entered into during trial of the state cases, Continental and Fibreboard stipulated that potential questions

significant that Fibreboard at all times relied on California law. It never claimed that the law of another state should apply with respect to any coverage issue.

The district court, and ultimately the Ninth Circuit, nevertheless held that Texas law should be applied here, balancing California's interests in deterring aggravated torts and regulating insurance contracts issued in California against "Texas' express interest in applying Texas law to insurance contracts 'payable to inhabitants of Texas . . .' or issued in favor of insureds doing business in Texas." Pet. App. 26a (quoting *American Home Assur. Co. v. Safway Steel Prods. Co.*, 743 S.W.2d at 699, which in turn cited Tex. Ins. Code Ann. art. 21.42).[13] *See also* Pet. App. 22a (citing *Safway* for the proposition that Texas courts would apply Texas law in this context). In essence, these courts held that Texas has overriding interests in assuring full damage recoveries by Texas tort victims and in protecting out-of-state corporations operating in Texas from uninsured liability for punitive damages.

Purely as a matter of state law, this ruling is highly suspect. California plainly has paramount interests in applying its law to the interpretation and enforcement of California insurance policies. *See, e.g., Robert McMullan & Son, Inc. v. United States Fidelity & Guaranty Co.*, 103 Cal. App. 3d 198, 162 Cal. Rptr. 720 (1980) (California law applies to interpretation of insurance policy issued by

---

concerning insurance for punitive damages would be litigated at a subsequent time. *See* Pet. App. 6a n.1.

[13] Article 21.42 provides that any "contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business with this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, ..." This Court long ago held that this statute was unconstitutional to the extent that it applies to insurance contracts between an out-of-state insurer and an out-of-state insured. *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924).

Maryland insurer to California insured, where policy issued in California but loss occurred in Florida); *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 873 (5th Cir. 1990) (under Texas "most significant relationship" test, Texas law may not be applied to interpretation of insurance contract between out-of-state insured and out-of-state insurer, even though loss occured in Texas).

From a constitutional perspective, the key point is that the California interest-balancing approach pays little or no heed to the factor that should control the outcome in this kind of case—the need to respect the reasonable expectations of the parties at the time they entered into the contract. That approach thus allowed the courts below to strain to reach a result they apparently perceived as desirable—*i.e.*, maximizing insurance coverage for a large-scale liability. Remarkably, they did this even in the face of a Fifth Circuit ruling in a similar case narrowly construing *on constitutional grounds* the same Texas decision that formed the basis of the determination that Texas has strong interests in applying its law to insurance policies covering injuries occurring in Texas. *See W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d at 883 (*per curiam* opinion on petition for rehearing).[14] The result was a denial of the fundamental fair-

---

[14] In *W.R. Grace*, the asbestos manufacturer cited in its rehearing petition *American Home Ins. Co. v. Safway, supra*, the decision on which the district court placed heavy reliance, Pet. App. 22a-23a, as well as the Texas statute (Tex. Ins. Code Ann. art. 21.42) that formed the basis of the ruling in *Safway*. That statute provides that any insurance policy payable to a Texas resident should be governed by Texas law. *See* note 13, *supra*. The Fifth Circuit, however, stated that "application of art. 21.42 would raise serious questions of constitutionality under the Commerce Clause as well as the due process clause of the fourteenth amendment." 896 F.2d at 883 (*per curiam* opinion on petition for rehearing). It construed *Safway* as limited to cases where, unlike here, the insurer has already paid a claim to a Texas tort victim while reserving the right to contest coverage with its insured. *Id.*

ness mandated by the due process clause through the imposition of liability that petitioner had no reason to foresee when it agreed to provide insurance coverage in 1957.

To be sure, this Court has on occasion indicated that an insurance company selling a policy covering injuries that may occur nationwide must have anticipated application of the law of many different states. *See Allstate Ins. Co. v. Hague*, 449 U.S. at 318 & n.24; *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. at 181-82; *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66, 71-73 (1954). *Clay* and *Watson*, however, involved state statutes creating narrow exceptions to the prevailing *lex loci* choice-of-law principles—exceptions that were procedural in nature and thus did not affect the basic nature of the risks that the insurers had agreed to cover.[15] This Court had already drawn a distinction between (1) contractual provisions affecting "remedies and procedure," which "even if valid where made, are often disregarded by the court of the forum, pursuant to statute or otherwise," and (2) provisions involving "rights and obligations," which could not be "affect[ed]" by the law of a state that was not the locus of the contract's creation or performance. *Home Ins. Co. v. Dick*, 281 U.S. at 409-10.

As for *Allstate*, it involved an auto insurance policy issued (1) after the *lex loci* doctrine was "largely abandoned," 449 U.S. at 316 n.22, and (2) to an inherently mobile individual insured who regularly commuted to the

---

[15] In *Clay*, the issue was application of a state statute abrogating contractual provisions requiring suits to be brought in less than five years. The Court there acknowledged that the mere fact of issuance of a policy covering multi-state risks was not enough, in itself, to eliminate constitutional limits on the application of a particular state's law. 377 U.S. at 181-82. In *Watson*, the issue was application of a state statute authorizing injured parties to bring a direct action against the liability insurer of a manufacturer whose product caused the injury. The Court there emphasized that the forum state had a particular interest in application of this procedural statute in order to assure that its citizens could bring suit against a responsible party in that state. 348 U.S. at 72-73.

state whose law had been applied, *id.* at 313-14. In that context, the Court held that the insurer had no basis for relying on application of the law of the state where the insured resided. *Id.* at 316 n.22. But the Court also reaffirmed that the Constitution sets limits on choice of law even in cases involving national companies issuing policies covering injuries inflicted nationwide. *Id.* at 308-11.

As *Allstate* illustrates, a reversal in this case on due process grounds would not "federalize" all choice of law and would not, in particular, force a general return to the traditional *lex loci* doctrine. Such a decision would merely require courts to respect the expectations of a party to a contract dating from a time when that party had every reason to rely on application of a particular state's law and no reason to include contractual provisions either duplicating the coverage limitations set out in that state's law or barring application of some other state's law.

II. STATE AND FEDERAL COURTS ACROSS THE COUNTRY NEED CONSTITUTIONAL GUIDANCE BECAUSE THEY ARE RENDERING INCONSISTENT CHOICE-OF-LAW DETERMINATIONS THAT FREQUENTLY FRUSTRATE THE REASONABLE EXPECTATIONS OF THE PARTIES.

The argument for Supreme Court review is compelling here because the decision below is but one example of the choice-of-law issues that are currently confronting courts across the country adjudicating disputes over insurance coverage for multistate torts. In this mountain of cases, frequently involving toxic torts or liability for environmental clean-up costs, the courts have reached widely divergent results—sometimes applying the law of the state where the contract was signed or the tortfeasor operated, but sometimes ruling that the interpretation of the insurance contract would be governed by the law of the many different states where injuries were incurred. While such variation is not by itself a matter

of federal concern, and each case must be analyzed on its particular facts, the reality is that there is a clear need for constitutional guidance in this area. All too often, the formless "interest-balancing" approach to choice of law now prevailing in most states has become a vehicle for maximizing insurance coverage at every turn—with no apparent recognition of the constitutional requirement that the parties' reasonable expectations be respected.

The recent wave of litigation over toxic torts and environmental cleanup programs has produced a seemingly limitless amount of litigation concerning the meaning of comprehensive general liability policies. *See, e.g.*, Gilchrist, *Insurance Coverage for Pollution in the United States and the United Kingdom: Covering Troubled Waters*, 23 Case W. Res. J. Int'l L. 109, 113 (1991). In these cases, choice-of-law questions have become progressively more significant. The reason is simple. Environmental and toxic tort insurance coverage cases often involve an insurance policy purchased by a manufacturer in one state from an insurer in another state, where the liability for which the manufacturer seeks indemnity arises in dozens of states. Courts asked to make choice-of-law determinations in this context are faced with the competing interests of the respective states and are confronted by sharply different state insurance laws, in cases where the application of the law of one state rather than another can (as in this case) cost a litigant hundreds of millions of dollars.

The result has been acute confusion, with decisions branching off in a variety of directions. Many courts have decided that such cases should routinely be determined under the law of the state in which the injury or pollution occurred, or, as in this case, where the third-party claimants reside. *See, e.g., G. Heileman Brewing Co. v. Royal Group, Inc.* No. 88 Civ. 1041 (JFK), 1991 WL 120366 (S.D.N.Y. June 21, 1991); *Jones Truck Lines v. Transport Ins. Co.*, No. Civ. A 88-5723, 1989

WL 49517 (E.D. Pa. May 10, 1989); *Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 603 A.2d 61, 65 (N.J. Super. 1992); *Sangamo Weston, Inc. v. National Sur. Corp.*, 414 S.E.2d 127, 130-31 (S.C. 1992); *St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc.*, 777 P.2d 1259, 1269 (Kan. 1989), *cert. denied*, 493 U.S. 1036 (1990). Consequently, if toxic dumpsites, asbestos-contaminated buildings or third-party claimants are located in numerous states, a single court may apply the insurance coverage laws of multiple states in the same action.

Other courts have rejected such an approach not only as unworkable but also, and more importantly, as wholly inconsistent with the reasonable expectations of the parties. As one court has stated:

> "In our view, the notion that the insured's rights under a single policy vary from state to state depending on the state in which the claim invoking the coverage arose contradicts not only the reasonable expectation of the parties but also the common understanding of the commercial community. It also seems to us anomalous, in conflict-of-law terms, to suggest that more than one body of law will apply to a single contract."

CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 739 F. Supp. 710, 714 (D.R.I. 1990) (quoting *Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co.*, 559 A.2d 435, 442 (N.J. Super. 1989)). Another court noted that the application of a single state's law to determine coverage

> produces coherent interstate insurance coverage; *appears to conform to justified expectations*; offers the prospect of certainty, predictability, and uniformity of result; provides relative ease in the determination and application of the governing law; and looks to the law of the State which, as to the legal issues involved, has the most significant relationship with the transaction and the parties.

W.R. Grace & Co. v. Hartford Accident & Indem. Co., 555 N.E.2d 214, 221-22 (Mass. 1990) (emphasis added). *See also Detroit Edison Co. v. Pacific Ins. Co.*, 742 F. Supp. 287, 289 (M.D.N.C. 1990) ("The expectations of the parties [in toxic waste cleanup case] could not have been that the [insurance] contract be subject to varying interpretations dependent only upon the location of an occurrence forming the basis for a claim."), *aff'd*, 944 F.2d 901 (4th Cir. 1991); *National Starch & Chem. Co. v. Great Amer. Ins. Co.*, 743 F. Supp. 318, 322 (D.N.J. 1990).

These courts have agreed that the law of a single state should determine the insurance coverage obligations of the insurer, regardless of how many states contain injured persons or property. They generally have adopted either the law of the state where the contract was made or performed, *see, e.g., W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d at 873; *Detroit Edison Co. v. Pacific Ins. Co.*, 742 F. Supp. at 289; *W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 555 N.E.2d at 221-22; *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 390 S.E.2d 562, 567 (W. Va. 1990), or the law of the state where the insured is located, *see, e.g., Potomac Elec. Power Co. v. California Union Ins. Co.*, 777 F. Supp. 968, 973 (D.D.C. 1991); *CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 739 F. Supp. at 715; *E.I. DuPont De Nemours & Co. v. Admiral Ins. Co.*, No. 89C-AU-99, 1991 WL 236943 (Del. Super. Oct. 22, 1991).[16]

In light of the prevailing confusion in this area, a grant of review in this case would be of significant benefit. This Court has already recognized the need to maintain constitutional limits on state choice-of-law rules, tied to the reasonable expectations of contractual parties. Yet

---

[16] This latter distinction generally is unimportant for, in most cases, the state where the insured is located and the state having the strongest relationship to the insurance contract is the same.

these constitutional limits are being routinely ignored in the context where they are of greatest current importance —in insurance coverage disputes. This may be due to the fact that *Shutts* was an extreme case—involving application of the law of a state that had *no* connection to most of the gas leases being enforced in a national class action. *See* 472 U.S. at 819-23. It may also be true that this Court's discussion of the "reasonable expectations" factor —in *Shutts* and in the various opinions in *Allstate Ins. Co. v. Hague*—has somehow not been sufficiently clear. *See* Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 59 (1986) (constitutional limits on choice of law, after *Shutts*, "remain only generally defined").

A ruling in this case could thus serve to clarify the applicable constitutional principles, both generally and as they apply in the key context of insurance coverage for nationwide torts. In so doing, it could reinforce respect for what this Court has identified as the primary constitutional factor, the parties' reasonable expectations. The result, at least in many cases, would likely be simplification of the applicable law by curtailment of the practice of applying different states' laws to each covered occurrence. But such a constitutional ruling would not interfere unduly with the evolution of state choice-of-law standards, within the basic constitutional constraints. It would allow that evolution to proceed, subject only to the proviso that, in fairness, new approaches may not be applied in such a way as to ignore the assumptions that formed the basis of existing contracts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

* *Counsel of Record*

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16519
DC No. CV-90-01452-TEH

CONTINENTAL CASUALTY COMPANY,
Plaintiff-Appellee,
v.

FIBREBOARD CORPORATION,
Defendant-Appellee,
v.

PACIFIC INDEMNITY CO.,
Applicant in
Intervention-Appellant.

No. 91-15331
DC No. CV-90-01452

CONTINENTAL CASUALTY COMPANY,
Plaintiff-Appellant,
v.

FIBREBOARD CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted December 12, 1991
San Francisco, California

ORDER *

[Filed Jan. 16, 1992]

Before: HUG, HALL, and O'SCANNLAIN, Circuit Judges.

For the reasons set forth by the District Court in its orders filed October 15, 1990 and February 13, 1991, the judgment is

AFFIRMED.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C 90 1452 TEH

CONTINENTAL CASUALTY COMPANY,
Plaintiff,

v.

FIBREBOARD CORPORATION,
Defendant.

Feb. 13, 1991

Rodney L. Eshelman, Dana Stanculescu, Carroll, Burdick & McDonough, San Francisco, Cal., for Continental Gas Co.

William R. Irwin, Kelly C. Wooster, Jayne Loughry, Brobeck, Phleger & Harrison, San Francisco, Cal., for Fibreboard Corp.

Terry L. Croghan, San Francisco, Cal., Paul J. Bschoor, Tomas McGanney, Richard B. Sypher, Linda E. Meyer, White & Case, New York City, intervention for Pacific Indem. Co.

ORDER

THELTON E. HENDERSON, Chief Judge.

This matter comes before the court on the plaintiff's motion for summary judgment. Continental Casualty Company ("Continental"), an insurer of the asbestos manufacturer, Fibreboard Corporation ("Fibreboard"), has brought an action seeking declaratory judgment that it is not obligated to indemnify Fibreboard for punitive damages awarded against Fibreboard in jury trials conducted

in West Virginia and Texas. Continental moves for summary judgment on the ground that, as a matter of public policy, California law prohibits insurance coverage for punitive damage awards.

Fibreboard argues that the laws of West Virginia and Texas, where the punitive damages were awarded, govern this case, and that in those states, insurance of the punitive damages at issue is permitted. In the alternative Fibreboard argues that even if California law is applied, the damages at issue do not constitute "punitive damages" as defined in California law, and that therefore insurance is not prohibited. Fibreboard argues that California's policy is designed to punish and deter specific behavior, and that the behavior here at issue does not fall into that category.

The motion came on for hearing on Monday, October 22, 1990. After careful consideration of the parties' written and oral arguments, it appears to the satisfaction of the court therefrom that the plaintiff's motion should be DENIED.

BACKGROUND

Fibreboard is a Delaware corporation with its principal place of business in California. From 1928 to 1971 Fibreboard, at its California facilities, manufactured products containing asbestos, which were sold in California and in other states.

In 1957, Fibreboard purchased a liability insurance policy from Continental, an Illinois corporation, for coverage from May 1957 to March 1959. The parties entered into this insurance contract in California, and premiums were paid in California. The policy provides that Continental will pay "all sums which [Fibreboard] shall become obligated to pay by reason or in consequence of legal liability for damage however or wherever created or alleged to have arisen or to have been created, because of bodily injuries . . . suffered by any person." The policy

does not expressly exclude coverage for punitive damages, and it has no choice of laws provision.

In re Asbestos is a consolidated action pending in the West Virginia Circuit Court, Kanawah County, No. 84-C-3321, in which 300 plaintiffs have sued Fibreboard for asbestos-related bodily injury claims. In the first phase, the jury found Fibreboard liable for punitive damages to any plaintiff who subsequently is awarded compensatory damages.

In April of 1990, a Texas jury found Fibreboard liable for punitive damages in *Cimino, et al. v. Raymark Indus., Inc., et al.*, a class action with over 2,300 plaintiffs in the United States District Court for the Eastern District of Texas. Civil Action No. B-85-0546.

Continental now seeks a declaration that it is not required to reimburse Fibreboard for the punitive damages awarded in the West Virginia and Texas actions.

LEGAL STANDARD

The legal standard in a summary judgement motion is a rule of procedure, not substance, and so under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79, 58 S.Ct. 817, 822-23, 82 L.Ed. 1188 (1938) is governed by federal law in a diversity action. In Federal district court, pursuant to Rule 56(c), to prevail in a motion for summary judgement, the moving party must establish: (1) that there is " no genuine issue of material fact, and (2) that the moving party is entitled to judgement as a matter of law." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978); Fed.R.Civ.P. 56(c). The moving party must show that no reasonable trier of fact could find other than for the moving party. Schwarzer, *Summary Judgment under the Federal Rules*, 99 F.R.D. 465, 487-88 (1984). All reasonable inferences from the evidence are to be drawn in favor of the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505,

2513, 91 L.Ed.2d 202 (1986). However, "[t]he mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could *reasonably* find for [the opposing party]." *Id.* 106 S.Ct. at 2512.

In this action there is no dispute over the facts described above. This matter may properly be resolved on summary judgement.

ANALYSIS

Continental urges the application of California law to this case, while Fibreboard argues that we should apply the laws of West Virginia and Texas. The threshold issue is therefore that of the proper choices of laws.[1]

In an action brought under diversity jurisdiction, a federal district court applies the choice of law analysis of the state in which it sits. *Liew v. Official Receiver & Liquidator*, 685 F.2d 1192, 1195 (9th Cir.1982), citing, *Klaxon Co. v. Stentor Elec.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). We are to decide state law issues as would the Supreme Court of our forum state. *C.I.R. v. Estate of Bosch*, 387 U.S. 456, 464-65, 87 S.Ct. 1776, 1782, 18 L.Ed. 2d 886 (1967).

The California Supreme Court resolves conflict of laws questions through a "governmental interest" analysis,

---

[1] In support of its argument that California law governs this case, Continental relies heavily on San Francisco Superior Court Judge Ira Brown's Decision in *Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceeding No. 1072 (January 24, 1990).

It is clear that Fibreboard did not participate in the portion of the trial in which issues concerning punitive damages were decided. In that phase of the trial, Judge Brown held that none of the parties had timely invoked the law of another state. Furthermore, Continental and Fibreboard stipulated that "whether or not the policies issued by to Fibreboard provide indemnity coverage for awards of punitive damages shall be deferred and determined on a case-by-case basis later if necessary." Therefore, it is clear that Judge Brown did not reach the issues now before us.

Reich v. Purcell, 67 Cal.2d 551, 554, 63 Cal.Rptr. 31, 34, 432 P.2d 727 (1967); *Hurtado v. Superior Court*, 11 Cal.3d 574, 579, 114 Cal.Rptr. 106, 109, 522 P.2d 666, 668-69 (1974) which requires the court "to find the proper law to apply based upon the interests of the litigants and the involved states." *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal.3d 157, 161, 148 Cal.Rptr. 867, 583 P.2d 721 (1978).

However, there is no conflict if the same outcome would be reached under the laws of each of the states involved. *Hurtado*, 11 Cal.3d at 580, 114 Cal.Rptr. at 109, 522 P.2d at 668-69. Therefore, the first question is whether the outcome of this summary judgement motion differs if California law is applied, as opposed to the laws of West Virginia and Texas.

Insurability of Punitive Damages in California

City Products Corp. v. Globe Indemnity Co., 88 Cal. App.3d 31, 151 Cal.Rptr. 494 (1979) was the first statement of California's public policy bar against the insurance of punitive damages. The basic rationale for the *City Products* rule was that insurance undermines the punitive and deterrent purposes of punitive damages. Punitive damages are designed to punish especially blameworthy tortfeasors. "[T]he policy of this state with respect to punitive damages would be frustrated by permitting the party against whom they are awarded to pass on the liability to an insurance carrier." Id. at 42, 151 Cal.Rptr. 494. The California Supreme Court adopted the *City Products* rule in *Peterson v. Superior Court*, 31 Cal.3d 147, 181 Cal.Rptr. 784, 642 P.2d 1305 (1982).

The *City Products* court recognized a sharp split among jurisdictions as to the insurability of punitive damages. The Court noted that the jurisdictions which prohibit insurance for punitive damages are those in which punitive damages are allowed for only exceptionally egregious conduct, defined as "fraud, oppression or malice." *City*

Products, 88 Cal.App.3d at 41, 151 Cal.Rptr. 494. In such jurisdictions, punitive damages have as their only purpose punishment and deterrence. This purpose would be undermined by insurance. Id.

Jurisdictions which allow punitive damage insurance have a much lower threshold for awarding punitive damages, allowing them for "gross negligence or reckless or wanton conduct." Id. The *City Products* court noted that courts in such jurisdictions have recognized the unfairness to a person "who might well be ruined financially by a judgment for punitive damages as the result of conduct of no more flagrancy than an act of 'gross negligence,' a monetary 'reckless' act, or conduct 'contrary to societal interests.' " Id. at 41, 151 Cal.Rptr. 494, quoting *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 567 P.2d 1013, 1021 (1977).

The *City Products* court held that California has the higher threshold for awarding punitive damages and should therefore disallow punitive damage insurance. Id. The court stated:

> Such coverage is valid in jurisdictions where punitive damages are allowed in respect of gross negligence or reckless or wanton conduct. On the other hand, the authorities in jurisdictions where punitive damages are limited to cases involving fraud, oppression or malice have generally invalidated insurance coverage for punitive damages on public policy grounds.
>
> It is clear that California falls into the latter category . . . It is also clear the primary purposes of punitive damages awards in this state are those . . . "for punishment and deterrence." Id. at 41, 151 Cal.Rptr. 494 (citations omitted).

In *Ford Motor Co. v. Home Ins. Corp.*, 116 Cal.App.3d 374, 172 Cal.Rptr. 59 (1981), (a case involving defects in the design of the Ford Pinto), the court extended the

City Products rationale to products liability cases. The court recognized the split among jurisdictions, and that the reason for which insurance for punitive damages is disallowed in California is related to California's high threshold for the assessment of punitive damages.

> The rationale underlying the asssesment of punitive damages in California, viewed in perspective with the law of other jurisdictions, formed the basis for the *City Products* decision. In California, conduct is sufficiently culpable to warrant assessment of punitive damages *only* if it involves fraud, oppression or malice. Mere unintentional carelessness, characterized as negligence or recklessness, is not sufficient. The purpose of punitive damages is to punish and deter sufficiently culpable conduct . . . Id. at 380, 172 Cal.Rptr. 59.
>
> In California, malice is the basis for assessing punitive damages for nonintentional conduct; that is, acts performed without intent to harm . . . [P]unitive damages may be assessed based on a finding that the company has shown a conscious disregard for the person's safety.
>
> Id. at 380-82, 172 Cal.Rptr. 59.

In accordance with the above, in order to determine whether the punitive damages awarded by the Texas and West Virginia juries are insurable under California law, we must determine whether the conduct underlying those damages was "sufficiently culpable," Id. at 380, 172 Cal. Rptr. 59, to qualify for punitive damages under California law.

Since the punitive damages at issue in our case were awarded in West Virginia and Texas, we can not assume that they were awarded in accordance the strict California standard for punitive damages. California law prohibits insurance of the damages at issue only if the West Virginia and Texas juries found Fibreboard liable

for punitive damages based upon conduct which would warrant an imposition of punitive damages in California, otherwise the conduct at issue would not be of the category which California seeks to deter by a prohibition of insurance. If the Texas and West Virginia juries found Fibreboard liable based upon conduct which would not justify the imposition of punitive damages in California, but which did satisfy the lower threshold for punitive damages existing in Texas and West Virginia, then California public policy would not prohibit insurance of the punitive damages.

Insurability of West Virginia Punitive Damages Under California Law

The Judge in the West Virginia action instructed the jury that they could award punitive damages "where a preponderance of the evidence reveals that such Defendant acted with the intent to cause injury or is guilty of malice, oppression, or wanton, willful, *and* reckless disregard for the rights of others." Excerpts from Trial Transcript, *In re Asbestos*, Exhibit D to Request to Take Judicial Notice at 23-24 (emphasis added). However, the verdict form shows that the jury awarded punitive damages based upon a finding that the defendant had "acted intentionally, oppressively, willfully, and maliciously or in wanton or reckless disregard for the rights of others in the manufacture or sale of the defective product." Verdict Form, *In re Asbestos*, Exhibit E to Request to take Judicial Notice. We hold that the Verdict Form provides the relevant information for resolution of our case, since the Verdict Form reflects the conduct for which Fibreboard was found liable.

On the basis of the Verdict Form, the jury may have found Fibreboard liable for "intentional," "oppressive," "willful" or "malicious" conduct. - It is clear under the standard articulated in *City Products* and *Ford Motor* that such a finding would justify punitive damages in

California, and that as such, insurance of punitive damages awarded on such a basis would be disallowed under California law.

However, since the Verdict Form was worded in the alternative, the West Virginia jury may have found Fibreboard liable only for "reckless disregard for the rights of others in the manufacture or sale of the defective product." California courts have held that "[n]onintentional torts may also form the basis for punitive damages when the conduct constitutes conscious disregard of the rights or safety of others . . ." *Peterson v. Superior Ct.*, 31 Cal.3d 147, 158, 181 Cal.Rptr. 784 (1982), citing, *Taylor v. Superior Ct.*, 24 Cal.3d 890, 157 Cal.Rptr. 693, 589 P.2d 854 (1979); *G.D. Searle & Co. v. Superior Ct.*, 49 Cal.App.3d 22, 122 Cal.Rptr. 218 (1975); *See also*, *Ford Motor Co. v. Home Ins.*, *supra*, 116 Cal. App.3d at 382, 172 Cal.Rptr. 59. The California courts have repeatedly stated that mere "recklessness" is not a sufficient basis for the imposition of punitive damages in California. *Ford Motor Co.*, *supra* at 380, 172 Cal.Rptr. 59; *City Products*, *supra*, 88 Cal.App.3d at 41, 151 Cal. Rptr. 494; *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.*, 185 Cal.App.3d 1149, 1154-55, 230 Cal. Rptr. 276 (1986).

The "conscious disregard" standard adopted in California requires an element of knowledge which is not inherent in merely "reckless disregard." In California "the plaintiff must establish that the defendant was aware of the probable consequences of his conduct and that he willfully and deliberately failed to avoid those consequences." *Hasson v. Ford Motor Co.*, 32 Cal.3d 388, 402, 185 Cal.Rptr. 654, 650 P.2d 1171 (1982). A finding of "reckless disregard" could be based on behavior which does not meet the California standard for the imposition of punitive damages. Consequently, California public policy would not prohibit insurance of the punitive damages awarded on such a basis. Unfortunately, we are un-

able to determine from the West Virgina Verdict Form whether the punitive damages were awarded for "reckless disregard," or for "malice," or "oppression."

Under California law, "once the insured shows that an event falls within the scope of basic coverage under the policy, the burden is on the insurer to prove a claim is specifically excluded." *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal.3d 395, 406, 257 Cal.Rptr. 292, 770 P.2d 704 (1989). There is no question that the language of the policy at issue provides for insurance of the punitive damages at issue. "All sums" are insured. No language in the policy excludes punitive damage coverage, although the parties were free to include such a provision.

It is therefore Continental's burden to demonstrate that the punitive damages at issue fall within California's public policy exclusion to the insurance of punitive damages. This Continental has not done. Therefore, we hold that under California law, public policy does not prohibit insurance of the punitive damages awarded against Fibreboard by the West Virginia jury.

Uninsurability of the Texas Punitive Damages under California Law

We must apply a similar analysis to determine whether California law prohibits the insurance of the punitive damages awarded in Texas. The Texas Judge instructed the jury that it could award punitive damages only if it found that Fibreboard had exhibited "such an entire want of care as to establish that the act or omission in question was the result of actual conscious indifference to the rights, welfare of safety of the persons affected by it." Excerpts from Trial Transcript, *Cimino v. Raymark, et al.*, Exhibit G to Request to Take Judicial Notice at 5557. While the Texas Judge labelled such behavior "gross negligence," which would not support an award of punitive damages in California, it is clear that the behavior he describes would qualify for punitive damages in Califor-

nia. In other words, it is not the fact that the Judge used the term "gross negligence" which controls here, but rather, what he meant by that term. We quote from the jury instruction:

> [G]ross negligence means more than monetary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care to establish that the act or omission in question was the result of actual conscious indifference to the rights, welfare, or safety of the persons affected by it. . . .
>
> In other words, to establish gross negligence, plaintiffs must show that defendants knew about the peril but defendants' acts or failure to act showed they didn't care. You must, therefore, explore the defendants' corporate mental attitude . . . To determine if a defendant has been grossly negligent, the question is whether in light of all the surrounding circumstances, defendants failed to exercise care or exercise [sic] so slight a degree of care that one could say that the defendants were consciously indifferent to the interests of others . . .
>
> A determination of gross negligence against a defendant requires a finding by you that the defendant had actual knowledge of an asbestos-related health risk and made a conscious and deliberate decision to disregard that risk . . .
>
> Id. at 5557-60.

It is clear from this instruction that the conduct for which the Texas jury awarded punitive damages would also warrant an award of punitive damages in California. As discussed above, in California, a finding of "conscious disregard of the rights or safety of others . . ." *Peterson v. Superior Ct.*, 31 Cal.3d 147, 158, 181 Cal.Rptr. 784 (1982) is basis for an award of punitive damages.

The conduct for which the Ford Motor Company was found liable for punitive damages by a California court

in a case involving the Pinto is instructive here. The California appellate court stated: "if a company intentionally proceeds with conduct which will expose a person to a serious potential danger known to the company in order to advance the company's own pecuniary interest, punitive damages may be assessed based on a finding that the company has shown a conscious disregard for the person's safety." *Ford Motor Co. v. Home Ins. Co.*, *supra* 116 Cal.App.3d at 381-82, 172 Cal.Rptr. 59.

Under the standards articulated in *Peterson* and *Home Ins. Co.*, we hold that in the instant case the conduct for which Fibreboard was found liable by the Texas jury would merit an award of punitive damages in California, and that therefore California public policy prohibits the insurance of the punitive damages awarded against Fibreboard by the Texas court.

Insurability of Punitive Damages in West Virginia

West Virginia has no absolute public policy bar against the insurance of punitive damages awarded in that state. West Virginia allows punitive damages for a much broader range of conduct than does California. West Virginia law prohibits insurance of punitive damages only when they are based upon conduct which meets a threshold level of culpability. The West Virginia Supreme Court has held that:

> [W]e refuse to find that our public policy precludes insurance coverage for punitive damages arising from gross; reckless or wanton negligence. Such action rooted in negligence as distinguished from a purposeful or intentional tort does not in our opinion carry the degree of culpability that should foreclose the right to insurance coverage.
>
> *Hensley v. Erie Ins. Co.*, 168 W.Va. 172, 283 S.E.2d 227 (1981).

In making the above holding, the West Virginia Supreme Court noted that punitive damages in West Vir-

ginia serve purposes other than punishment and deterrence. The Supreme Court noted that "punitive damages are additional compensation for the egregious conduct that has been inflicted on the injured party," Id., 283 S.E.2d at 233, and that "[t]here does not seem to be any reason to fail to acknowledge that the injured party does benefit from an award of punitive damages. We find nothing in our social or public policy that precludes this consideration when we evaluate the propriety of permitting coverage for punitive damages occasioned by gross, reckless or wanton negligence." Id.; *see also, Harless v. First National Bank*, 169 W.Va. 673, 289 S.E.2d 692, 702 (1982).

The West Virginia Supreme Court has also noted that "punitive damage awards may encourage persons who have suffered only nominal or minimal damages, to sue those who conduct themselves outrageously . . . punitive damages also may provide a substitute for personal revenge by the wronged party." *Perry v. Melton*, 299 S.E. 2d 8, 13 (1982). The court noted that these purposes, unlike California's exclusive purposes of punishment and deterrence, are not undermined by insurance.

West Virginia's approach focuses far more on the compensation of the injured victim than does California's approach, which looks solely to deterrence and punishment of the tortfeasor and of potential tortfeasors. The West Virginia court stated: "That the punitive damages may be paid by a liability insurer is no reason to deny their recovery. Liability insurance protects persons who have been injured just as it protects an insured." Id. at 13.

Under West Virginia law we must determine whether the conduct for which the West Virginia jury awarded punitive damages against Fibreboard falls into the insurable or the uninsurable category. As explained above, due to the ambiguity of the Verdict Form, we cannot determine whether the West Virginia jury awarded puni-

tive damages on the basis that Fibreboard "acted intentionally, oppressively, willfully, and maliciously or in wanton or reckless disregard for the rights of others in the manufacture or sale of the defective product." Verdict Form, *In re Asbestos*, Exhibit E to Request to take Judicial Notice.

West Virginia law would clearly prohibit insurance coverage for a "purposeful or intentional tort." *Horace Mann Ins. Co. v. Leeber*, 376 S.E.2d 581 (W.Va.S.Ct. 1988). However, West Virginia allows insurance coverage for "punitive damages arising from gross, reckless or wanton negligence." *Hensley v. Erie Ins. Co., supra* 283 S.E.2d at 233; *Perry v. Melton, supra* at 12 ("the public policy of this State does not preclude insurance coverage for punitive damages arising from reckless misconduct.")

As discussed above, on the basis of the Verdict form, the jury may have found Fibreboard liable solely for "reckless disregard for the rights of others in the manufacture or sale of the defective product." Such reckless misconduct would not preclude insurance coverage in West Virginia.

West Virginia has adopted a policy under which insurance policies which purport to cover "all sums" are "liberally construed in favor of the policy holder and strictly against the insurer." *Hensley, supra* 283 S.E.2d at 229. In light of this policy, we hold that the burden is on Continental to demonstrate that under West Virginia law, the punitive damages awarded are not insurable. Continental has failed to do this, and therefore, we hold that West Virginia law, like California law, does not prohibit insurance coverage for the punitive damages awarded in West Virginia against Fibreboard. Therefore, there is no "true conflict" in this case between the laws of the State of California, and those of the State of West Virginia.

Insurability of Punitive Damages in Texas

The law in Texas is similar to that of West Virginia in that punitive damages are allowed for a broader range of conduct than in California. However, Texas is more generous in allowing insurance coverage than are either California or West Virginia.

Texas courts have repeatedly held that punitive damages serve numerous functions in their state, many of which are related to the compensation of the victim rather than to the punishment of the tortfeasor. The Texas Supreme Court has held that punitive damages serve: "to reimburse for losses too remote to be considered as elements of strict compensation;" as an "example for the good of the public and to compensate for inconvenience and attorneys' fees;" and as "compensation to the sufferer, as well as for punishment of the offender." *Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (Tex.S.Ct.1984). These compensatory goals are not undermined by insurance, in fact, they are potentially undermined by a policy against the insurance of punitive damages.

As for the goals of punishment and deterrence served by punitive damages, the Texas courts have held that "[i]t is doubtful whether the denial of insurance coverage for liability against punitive damages actually deters culpable actors . . . Whatever deterrence value punitive damages have under Texas law, we see no hindrances to the practical achievement of those objectives under a policy of law that allows for insuring against liability for punitive damages. *American Home Assurance Co. v. Safway Steel Prod.*, 743 S.W.2d 693, 704 (Tex.App. 1987).

Since Texas does not see its policy goals as being undermined by punitive damage insurance, the state is reluctant to allow insurers to avoid their contractual obligations to pay for "all sums" for which the insured has

become liable. "As long as insurance companies are willing, for a price, to provide protection against liability for punitive damages to companies they deem 'good risks,' and as long as punitive damage liability continues to extend to 'gross negligence,' we see no reason why these contracts should not be enforced." Id. at 705.

In the case underlying the instant action, the Texas jury found Fibreboard liable for "gross negligence," defined as "such an entire want of care to establish that the act or omission in question was the result of actual conscious indifference to the rights, welfare, or safety of the persons affected by it. . ." Excerpts from Trial Transcript, *Cimino v. Raymark, et al.*, Exhibit G to Request to Take Judicial Notice at 5557. It is clear that Texas law requires "all sums" insurers to pay for such punitive damages.

In *Manriquez v. Mid-Century Ins. Co.*, 779 S.W.2d 482 (Tex.App.1989), an insurer with an "all sums" contract was required to indemnify the insured against whom punitive damages had been awarded for "gross negligence" when that term was defined as an "entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it." Id. at 484.

American Home Assur. Co. v. Safway Steel Prod., supra, ("*Safway*") was similar to the instant case. In *Safway*, a football helmet manufacturer had been found "grossly negligent" for failing to warn its customers of "the limitations of the [football] helmet" in which a plaintiff was injured. Punitive damages were awarded. 743 S.W.2d 693, 695. The *Safway* court held that under the "all sums" insurance contract, the insurer was required to pay the punitive damage award. Id. at 705.

It is clear on the basis of the above authorities that Texas law would require Continental to reimburse Fibre-

board for the punitive damages awarded by the Texas jury and would certainly not prohibit such insurance. Since Texas law would allow insurance, while California law would prohibit it, we are presented with a true choice of law problem.

California/Texas Choice of Law Analysis

As discussed above, the California Supreme Court resolves conflict of laws questions through a "governmental interest approach," *Reich v. Purcell*, 67 Cal.2d 551, 554, 63 Cal.Rptr. 31, 34, 432 P.2d 727 (1967); *Hurtado v. Superior Court*, 11 Cal.3d 574, 579, 114 Cal.Rptr. 106, 109, 522 P.2d 666, 668-69 (1974), which requires the court "to find the proper law to apply based upon the interests of the litigants and the involved states." *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal.3d 157, 161, 148 Cal.Rptr. 867, 583 P.2d 721 (1978).

Under California choice of laws analysis, we are to look to the policies underlying each of the conflicting laws, and then are to determine which policy is more significantly impaired by the application of the law of the other state. The law of the more significantly impaired state is to be applied. *Paulo v. Bepex Corp.*, 792 F.2d 894 (9th Cir.1986); *Bernhard v. Harrah's Club*, 16 Cal.3d 313, 320, 128 Cal.Rptr. 215, 219, 546 P.2d 719, 723 (1976). This has sometimes been called the "comparative impairment" approach. *Bernhard, supra* at 320, 128 Cal.Rptr. 215, 546 P.2d 719. The comparative impairment approach is used in insurance contract cases as well as in tort actions. *Zimmerman v. Allstate Ins. Co.*, 179 Cal.App.3d 840, 224 Cal.Rptr. 917 (1986).

As we have already discussed, the fundamental policy purpose underlying California's rule forbidding insurance of punitive damages is to punish intentional tortfeasors and to deter others from engaging in similarly reprehensible conduct. In California:

> Punitive damages . . . are neither equitable nor corrective; punitive damages serve but one purpose—to punish and through punishment, to deter. Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious and to deter him and others from similar extreme conduct.
>
> *Dyna-Med, Inc. v. Fair Employment and Housing Comm'n*, 43 Cal.3d 1379, 1387, 241 Cal.Rptr. 67, 743 P.2d 1323 (1987).

California law assumes that this deterrent effect is diluted if punitive damages are insured. *California State Auto. Ass'n Inter-Ins. Bureau v. Carter*, 164 Cal.App. 3d 257, 210 Cal.Rptr. 140 (1985) ("The state's policy with respect to punitive damages would be frustrated by permitting punitive damages to be assessed against an insurance carrier.")

However, this fundamental policy goal is much less compelling when the tort has occurred out of state. While California does have an interest in keeping California corporations from injuring citizens in other states, the interest is much weaker than California's interest in protecting its own citizens through the deterrence of punitive damages. The California appellate court noted in *Zimmerman v. Allstate Ins. Co.*, 179 Cal.App.3d 840, 224 Cal.Rptr. 917 (1986), that California has no interest in extending into other states California policies designed to protect the public. "California has no legitimate interest in the possible deterrent effect of its third party cause of action on conduct in Oklahoma." Id. at 846, 224 Cal.Rptr. 917.

When a California corporation commits a tort in another state, the state in which the tort occurred has the greater interest in establishing policies which it believes best safeguard and promote the interests of the citizens of

that state. *Fed. Sav. & Loan Ins. Corp. v. Transamerica Ins.*, 661 F.Supp. 246 (C.D.Cal.1987), addressed the application of California insurance laws when a California insurance company had insured activities which occurred in the State of Missouri. The court stated:

> "California does have an interest in seeing that its resident businesses behave properly. Missouri has much stronger interests here. First, it has a direct interest in regulating the nature and effect of transactions conducted within in its own borders between its citizens and resident insurers. Second, it has an interest in determining whether to allow suits for punitive damages with all their defects—enormous uninsurable liability exposure of businessmen; windfalls to suing individuals . . . Third, Missouri surely has an interest in determining how much punishment is enough . . ." Id. at 251.

In *Paulo v. Bepex Corp.*, 792 F.2d 894 (9th Cir. 1986), an Ontario resident who was seriously injured in Ontario by a meat grinder produced in California sought to apply California tort law, which allowed much greater damages than did Ontario law. The Ninth Circuit applied the governmental interest approach of *Reich v. Purcell, supra*, finding that California's primary interest in allowing unlimited tort recovery was to safeguard the interests of its own citizens, not those of Ontario. "[California] has little interest in applying its law to compensate citizens of Ontario." Id. at 896. The *Paulo* court held Ontario law to apply. Ontario's policies, which were designed to compensate vicitms, but also to protect employers from overly large damages, were held to govern torts occurring inside Ontario involving Ontario victims.

Similarly, in *Ryan v. Clark Equip. Co.*, 268 Cal.App.2d 679, 74 Cal.Rptr. 329 (1969), Oregon law was chosen over Michigan law when an Oregon worker was injured in Oregon by a forklift produced in Michigan. The court held that while Michigan had an interest in deterring

companies in its state from committing wrongful conduct, this was outweighed by Oregon's interest in ensuring compensation to its citizens while also protecting businesses operating in its state from excessive damages. *See also, Denham v. Farmers Ins. Co.*, 213 Cal.App.3d 1061, 1066, 262 Cal.Rptr. 146, 148 (1989) ("California has no legitimate interest in the possible deterrent effect of its third party cause of action on conduct in [Nevada]").

California's policy against the insurance of punitive damages is designed to safeguard citizens through punishment and deterrence of tortfeasors. In light of the above cases, the underlying purpose of California's policy is highly attenuated since the harm at issue in the case at bar has occurred in Texas. The Texas courts and legislature have a greater interest than does California in establishing the policies which they believe are in the best interest of Texas citizens.

Texas apparently weighs compensation more highly than punishment. Texas recognizes many compensatory purposes for punitive damages which are not recognized in California, such as compensation for attorney fees and for losses too remote to be considered elements of strict compensation. *Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984). *See* discussion, *supra*. Texas has adopted a policy which maximizes the likelihood of full payment of jury awards to Texas citizens, thus promoting those compensatory purposes.

In *Amer. Home Assur. Co. v. Safway Steel Prod.*, 743 S.W.2d 693, 699 (Tex.App.1987) the Texas Appellate Court addressed a situation in which a Missouri company had sold football helmets in Texas which resulted in injury to a Texas citizen. Punitive damages were awarded against the company. The helmet manufacturer was insured by a New York Insurer under a contract signed in Missouri. The Texas court held its interests to be sufficiently strong to justify application of Texas law. The

court stated, "Texas has a policy of regulating insurance contracts payable to inhabitants of Texas." Id. Texas courts weigh this interest strongly even if the Texas citizen will receive full payment with or without insurance. Id. ("Although the compensation of Texas residents is no longer a concern, the fact remains that the instigating event—imposition of punitive damages—occurred in Texas.")

By allowing punitive damages to be insured, Texas also seeks to shield from excessively large punitive damages companies which choose to do business in Texas. *Amer. Home Assur. Co. v. Safway Steel Prod.*, 743 S.W.2d 693, 699 (Tex.App.1987) ("Texas' rule of construction . . . indicate[] a state interest in protecting the policyholder.") The Texas policy serves the interests of Texas citizens by insuring full payment of jury awards, and also by creating a climate which may be more attractive to businesses which will be insured for punitive damages.

Furthermore, the Texas courts do not believe that insurance negates any deterrent effect of punitive damages. The *Safway* court stated, "Whatever deterrence value punitive damages have under Texas law, we see no hindrances to the practical achievement of those objectives under a policy of law that allows for insuring against liability for punitive damages." Id. at 704.

Since the torts here at issue occurred in Texas, we hold that Texas' interests described above outweigh California's attenuated interest in punishing and deterring the wrongful behavior of California manufacturers. Application of the California policy to the instant case would greatly impair the Texas policies outlined above which the Texas courts have defined as in the best interests of their own citizens. This impairment outweighs the impairment to California's relatively weak interest in punishment and deterrence which would result from the application of Texas law.

There is an additional interest which California has in this case. Courts have held that California has an interest in seeing that insurance contracts entered into in California are governed by California law. *Clemco Indus. v. Commercial Union Ins. Co.*, 665 F.Supp. 816, 818 (N.D. Cal.1987) ("California has a very strong interest in regulating insurance contracts entered into with its own residents in its own jurisdiction . . .") In the instant case, Fibreboard, a California company, and Continental, an Illinois company, signed and negotiated the contract at issue in California. Payments were made in California. This weighs in favor of applying California law.

Robert McMullan & Son v. U.S. Fid. & Guar. Co., 103 Cal.App.3d 198, 162 Cal.Rptr. 720, 724 (1980) involved a California company which entered into a contract with a Maryland insurer to insure a painting job which was to be performed in Florida. The painting company was sued for defective performance of the Florida job. The California court held Cailfornia law to govern determination of liability under the contract for payment of damages awarded. The court stated: "California has an interest in seeing that such contract is enforced according to the law where it was made." The court stated that the purpose of the rule was to promote "foreseeability" so that parties negotiating insurance contracts would be able to estimate their potential liabilities. Id. The court noted that it addressed a matter of contract interpretation, which should be governed by the place where the contract was signed, not a matter of tort law, which might be governed by the place of the wrong. Id. 162 Cal.Rptr. at 724.

The instant case differs from that of *McMullan*. Fibreboard and Continental entered into their contract in 1957. The rule prohibiting the insurance of punitive damages was not adopted in California until *City Products* in 1979. Therefore, at the time of negotiating the contract, Continental should have foreseen that they might be required to pay any punitive damages for which Fibreboard might become liable.

The instant case also differs from that of *McMullan* in that Texas has much stronger interests here than did Florida in *McMullan*. Texas' interests are much stronger in the instant case, where hundreds of Texas residents claim to have been physically harmed by asbestos, compared to the situation in *McMullan* where a Florida company merely received a poor paint job. Texas has a very strong interest in adopting the policy which it believes will best safeguard the interests of its injured citizens.

Shippers Development Co. v. General Ins. Co., 274 Cal. App.2d 661, 79 Cal.Rptr. 388 (1969), supports the application of Texas law. In that case a Washington company was insured by a Washington insurer under a contract signed in Washington. A California resident was injured in California while working for the insured company. The court held that the law of California, the place of the injury, would control, rather than the law of Washington. The court stated, "The law of this state [California] in interpreting the policy will govern the extent of the coverage with respect to losses occurring within this state." Id. at 674, 79 Cal.Rptr. 388.

Similarly, in *Haisten v. Grass Valley Med. Reimb.*, 784 F.2d 1392 (9th Cir.1986) a California physician entered into a malpractice contract with a Cayman Islands insurinto a malpractice contract with a Cayman Islands insurer. The contract was signed in the Cayman Islands and had an express Cayman Islands choice of law provision. A California resident sued the physician for malpractice. Despite the Cayman Islands choice of law provision, the Ninth Circuit, applying California choice of law analysis, held that California's interests in protecting its own citizens required the application of California law to the case. The court stated, "Protection of California residents from the potential risk of injury thought to be created by insurance and from the unscrupulous practices of insurance companies which profit from premiums from California constitute sufficient interests to apply Califor-

nia law." Id. at 1403. *See also, Denham v. Farmers Ins. Co.*, 213 Cal.App.3d 1061, 262 Cal.Rptr. 146 (1989) (recognizing Nevada's strong interest in applying its insurance laws to accidents occurring within that state); *Strassbergh v. New England Mut. Life Ins. Co.*, 575 F.2d 1262 (9th Cir.1978) (applying California insurance law to interpret an insurance contract signed in New Jersey by a New Jersey resident and a New York insurer when the death at issue occurred in California).

Running counter to California's interest in applying its law of contract interpretation to contracts entered into in California, is Texas' express interest in applying Texas law to insurance contracts "payable to inhabitants of Texas . . ." or issued in favor of insureds doing business in Texas. *Safway*, 743 S.W.2d 693, 699 (Tex.App.1987).

In the final analysis, we believe that Texas' interests in this case outweigh those of California, and that Texas interests would be more impaired by the application of California law than would California's interests be impaired by the application of Texas law. Texas has devised a policy designed to insure maximum compensation and likelihood of recovery for citizens of its state, and which also limits the liability of companies which choose to do business in that state. California's interest in punishment and deterrence of California tortfeasors is greatly attenuated since the torts here at issue occurred in Texas.

California's interest in applying its own law to contracts entered into in California is also attenuated in this case. The primary purpose served by such a rule is in promoting foreseeability to satisfy to expectations of the contracting parties. However, in this case, the law at the time of contracting allowed insurance of punitive damages. Under the facts of this case, we recognize "the predominant interest of the state of the place of the wrong." *Hurtado v. Sup. Ct.*, 11 Cal.3d 574, 583, 114 Cal.Rptr. 106, 112, 522 P.2d 666, 672 (1974). Texas has a very

strong interest in applying its law and policy to a case in which hundreds of Texas citizens claim to have been injured by the actions of a California corporation.

Therefore, having conducted the governmental interest analysis required to determine choice of laws in California, we determine that Texas law governs the question of the insurability of the punitive damages awarded by the Texas jury against Fibreboard. As discussed above, under Texas law, those punitive damages are insurable.

For the foregoing reasons, and after careful consideration of the papers, legal memoranda, and oral argument offered by the parties; good cause appearing therefor, IT IS HEREBY ORDERED that:

1. The court GRANTS the plaintiff's request for judicial notice of the following documents:

a. Excerpts from testimony of witnesses in *In re Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceeding No. 1072, San Francisco Superior Court;

b. Excerpts from Judgment, filed on January 24, 1990 in *In re Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceeding No. 1072, San Francisco Superior Court;

c. Excerpts from Statements of Decision, filed on January 24, 1990 in *In re Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceeding No. 1072, San Francisco Superior Court;

d. Excerpts from Trial Transcript, *In re Asbestos*, No. 84-C-3321 (W.Va.Cir.Ct., Kanawah County);

e. Jury's Verdict, *Cimino et al. v. Raymark Industries, Inc. et al.*, Civ. No. B-85-0546 (United States Dist. Ct., E.D. Tex.);

f. Excerpts from Trial Transcript, *Cimino et al. v. Raymark Industries, Inc. et al.*, Civ. No. B-85-0546 (United States Dist. Ct., E.D.Tex.).

2. The court finds that under both California and West Virginia law, neither law nor policy prohibits the insurance of the punitive damages awarded against Fibreboard by the West Virginia jury in *In re Asbestos*, No. 84-C-3321 (W.Va.Cir.Ct., Kanawah County);

3. The court finds that Texas law governs the insurability of the punitive damages awarded against Fibreboard by the Texas jury in *Cimino, et al. v. Raymark Industries, Inc., et al.*, Civ. No. B-85-0546 (United States Dist. Ct. E.D.Tex., April 1990);

4. The court finds that neither law nor policy prohibits the insurance of the punitive damages awarded against Fibreboard in *Cimino, supra.*

5. The plaintiff's motion for summary judgment is DENIED;

6. There being no factual controversy relevant to this case, this court finds that as a matter of law, the plaintiff is not entitled to the declaratory relief which it seeks.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16519

DC No. CV-90-01452-TEH

CONTINENTAL CASUALTY COMPANY,
Plaintiff-Appellee,

v.

FIBREBOARD CORPORATION,
Defendant-Appellee,

v.

PACIFIC INDEMNITY CO.,
Applicant in Intervention-Appellant.

No. 91-15331

DC No. CV-90-01452

CONTINENTAL CASUALTY COMPANY,
Plaintiff-Appellant,

v.

FIBREBOARD CORPORATION,
Defendant-Appellee.

ORDER

[Filed Mar. 13, 1992]

Before: HUG, HALL, and O'SCANNLAIN, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FILED
AUG 14 1992
OFFICE OF THE CLERK

No. 91-1993

In The

Supreme Court of the United States

October Term, 1992

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

FIBREBOARD CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

KELLY C. WOOSTER*
JAYNE LOUGHRY
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
(415) 442-0900

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION RESTATED

Does the Due Process Clause of the Fourteenth Amendment prohibit a federal court in California, sitting in diversity, from applying California choice of law interest analysis so that a California local decisional rule, to the effect that punitive damages awarded in California are uninsurable, does not extend so far as to make uninsured a Texas punitive damages award which was rendered in favor of Texas residents, based on distribution of asbestos-containing products in Texas, and insurable under Texas law?

TABLE OF CONTENTS

Page

QUESTION RESTATED i

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

A. Background 1

B. Contentions in the District Court 2

C. The District Court's Ruling 4

D. Continental's Appeal to the Ninth Circuit 7

E. Continental's Petition to this Court 7

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. This Petition and the Choice of Law Decision in this Case Do Not Present Any Special and Important Reasons for Review by Certiorari ... 9

II. Constitutional Law Does Not Require Courts to Make Parties' Expectations Control Choice of Law Analysis, or to Freeze Choice of Law or Constitutional Rules at the Time a Contract Is Entered Into 13

III. Due Process Permits a Broad Scope of Choice of Law, and Application of a State's Laws That Is Not Fundamentally Unfair Is Perfectly Permissible 16

IV. The Rulings Below Did Not Defeat Continental's Reasonable Expectations, Certainly Not in Any Constitutionally Significant Way 20

TABLE OF CONTENTS – Continued

Page

A. Continental Could Have No Reasonable, Constitutionally Protected Expectation That California Law Always Would Apply In Every Case 20

B. The Insurance Policy, Under California Law in 1957, Did Not Exclude Coverage for California Punitive Damages, And Certainly Not for Awards Rendered Elsewhere 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924) 19

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) 13, 14, 18, 21, 22

American Home Assurance Co. v. Safway Steel Products Co., 743 S.W.2d 693 (Tex.Civ.App. 1987) 3, 19

California Ass'n. of Highway Patrolmen v. California Dept. of Personnel Admin., 185 Cal.App.3d 352, 229 Cal.Rptr. 729 (1980)..... 25

City Products Corp. v. Globe Indem. Co., 88 Cal.App.3d 31, 151 Cal.Rptr. 494 (1979) 2, 23, 27

Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964) ..20, 21

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)..... 10

Continental Casualty Co. v. Hall, 761 S.W.2d 54 (1988)..... 22

Continental Casualty Co. v. Swink, 329 S.W.2d 443 (1959)..... 22

Continental Casualty Co. v. Wade, 105 S.W. 35 (1907) 22

CPC Int'l., Inc. v. Northbrook Excess & Surplus Ins. Co., 739 F.Supp. 710 (D.R.I 1990)..... 12

De Sylva v. Ballentine, 351 U.S. 570 (1956) 10

Donnelly v. Southern Pacific Co., 18 Cal.2d 863, 118 P.2d 465 (1941)..... 26

TABLE OF AUTHORITIES – Continued

Page

G. Heilman Brewing Co. v. Royal Group, Inc., 1991 WL 120366 (S.D. N.Y., June 21, 1991) 11

Gilbert Spruance Co. v. Pennsylvania Manufacturers Ass'n. Ins. Co., 603 A.2d 61 (N.J. Super. 1992) 12

Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981) 26

Hartford Acc. & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934) 15, 16, 21, 23

Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W.Va. 1981) 3

Home Ins. Co. v. Dick, 281 U.S. 397 (1930) 15, 16, 21, 23

Hoopeston Canning Company v. Cullen, 318 U.S. 313 (1943) 20

Interinsurance Exchange v. Ohio Cas. Ins. Co., 58 Cal.2d 142, 373 P.2d 640 (1962) 25

Jones Truck Lines v. Transport Insurance Co., 1989 WL 49517 (E.D. Pa., May 10, 1989) 12

Jordan v. Consolidated Mut. Ins. Co., 59 Cal.App.3d 26, 130 Cal.Rptr. 446 (1976) 25

Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487 (1941) 13, 24

Kryger v. Wilson, 242 U.S. 171 (1916) 13

Lazenby v. Universal Underwriters Ins. Co., 214 Tenn 639, 383 S.W.2d 1 (1964) 23

Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 390 S.E.2d 562 (W. Va. 1990) 12

National Starch & Chem. Co. v. Great Amer. Ins. Co., 743 F.Supp. 318 (D.N.J. 1990) 12

TABLE OF AUTHORITIES – Continued

Page

Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1964) 23

O'Connor v. Ortega, 480 U.S. 709 (1987) 10

Ohio Casualty Ins. Co. v. Welfare Finance Co., 75 F.2d 58 (8th Cir. 1934), *cert. den.*, 295 U.S. 734 23

Ohio Ins. Co. v. Hubbard, 162 Cal.App.3d 939, 208 Cal.Rptr. 806 (1984) 3

Peterson v. Superior Court, 31 Cal.3d 147, 642 P.2d 1305 (1982) 26

Phillips Petroleum Corp. v. Shutts, 472 U.S. 797 (1985) 13, 18, 24

St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc., 777 P.2d 1259 (Kan. 1989), *cert. den.*, 493 U.S 1036 (1990) 12

W.R. Grace & Co. v. Continental Cas. Co., 896 F.2d 865 (5th Cir. 1990) 19

Watson v. Employers Liab. Assn. Corp., 348 U.S. 66 (1954) 17, 18, 20, 21

Watts v. Continental Casualty Co., 18 S.W.2d 591 (1929) 22

Wheeling v. Financial Indem. Co., 201 Cal.App.2d 36, 19 Cal.Rptr. 879 (1962) 14

Winn v. Continental Casualty Co., 494 S.W.2d 601 (1973) 22

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL & STATUTORY PROVISIONS:

Cal. Civ. Code §1646 ..... 3, 4, 5, 14

Cal. Ins. Code §533 ..... 25, 26, 27

Rules of the Supreme Court of the United States, Rule 10.1 9

OTHER AUTHORITIES:

16 A.L.R.4th 11 23

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment XIV, § 1, which provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

2. 28 U.S.C. § 1652, The Rules of Decision Act, which provides: "The laws of the several states, except where the Constitution of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

A. Background

In 1957, Continental Casualty Company issued a comprehensive general liability policy covering Fibreboard's operations and liabilities. The policy, although issued to Fibreboard's home office in California, specifically referred to named insureds outside that State. Fibreboard carried on a forestry, lumber, and insulation products business, and distributed its products throughout the country. The policy expressly applied to occurrences wherever they may happen.

Continental's policy covered "all sums" for which Fibreboard became obligated to pay by reason of legal liabilities for bodily injuries. It did not exclude coverage for punitive or exemplary damages, and it did not contain a choice of laws provision.

Juries in the federal district for the Eastern District of Texas (*Cimino v. Raymark Industries, Inc.*, No. 86-0456 CA)

and in a West Virginia state court (*In re Asbestos*, No 84-C-3321, Circuit Court, Kanawah County) held Fibreboard liable in asbestos cases for punitive damages, as courts in those states defined them, in 1990 and 1989, respectively. The judges instructed those juries under state standards less strict than the rules then in effect in California governing imposition of punitive damages. The West Virginia court permitted reckless conduct to suffice. The Texas court used a "gross negligence" standard, which in practice translated into a "conscious disregard" test, but with elements of constructive knowledge embodied in the instructions. These looser standards may be explained by the multiple purposes behind punitive damages in Texas and West Virginia, that is, compensation in one way or another joined punishment and deterrence as reasons recognized by both states to impose punitive damages.

Both Texas and West Virginia also allowed their punitive damages awards to be insured, because many of the purposes underlying punitive damages in those states would not be thwarted by insurability. California courts established a rule in 1979 which did not allow California punitive damages awards to be insured, lest the exclusive purposes of California punitive damages, punishment and deterrence, be undermined. *City Products Corp. v. Globe Indemnity Co.*, 88 Cal.App.3d 31, 151 Cal.Rptr. 494 (1979). No California reported decision has ever held that California law or policy prohibits insurance of punitive damages imposed under the laws of another state, particularly, a state where the award is insurable.

B. Contentions in the District Court

Continental sued Fibreboard in United States District Court, Northern District of California, seeking a declaration

that it was not responsible for the Texas or West Virginia punitive damages awards. Then it filed a summary judgment motion. Continental pointed out correctly that, because jurisdiction rested on diversity, the District Court was to apply forum law, including forum choice of law rules. Continental claimed that under a "traditional" California test, embodied in California Civil Code section 1646, a contract is to be "interpreted" according to the law of the place of performance, or if none is indicated, according to the law of the place where it is made. It then argued at length that under California's governmental interest test (California's choice of law method), California's local rule proscribing insurability governed. Fibreboard opposed Continental's motion.

First, Fibreboard pointed out, repeatedly, that the issue was not one of contract interpretation, for the policy "all sums" language plainly encompassed punitive damages. *Ohio Ins. Co. v. Hubbard,* 162 Cal.App.3d 939, 208 Cal.Rptr. 806 (1984); *American Home Assurance Co. v. Safway Steel Products Co.,* 743 S.W.2d 693 (Tex.Civ.App. 1987); *Hensley v. Erie Ins. Co.,* 283 S.E.2d 227 (W.Va. 1981). Thus, California Civil Code section 1646 had nothing to do with the case.

Second, Fibreboard observed that, after changes in 1987 to California statutes, courts in California could impose punitive damages only on clear and convincing evidence, and for intentional conduct, or despicable conduct carried on with a willful and conscious disregard of the rights of others. Fibreboard contended that unless the current strict California standards were satisfied, California public policy was *not* to punish the conduct in question. That meant, of course, that California would not

prevent insuring conduct it would not even punish. Since the Texas and West Virginia awards did not come close to meeting California's current standards for punishment, insuring them did not offend California's policy designed to make sure that those who deserved punishment stayed punished, and so there was no conflict.

Third, Fibreboard analyzed governmental interest factors and showed that, even were there a conflict, Texas and West Virginia had much greater interests – which would be more impaired by applying any California rule preventing insurability – than did California in having its local rule apply. Accordingly, Fibreboard asked the District Court, if it found a conflict, to apply Texas and West Virginia law, both of which approved insurability.

Continental submitted a reply. It neither claimed there existed any issue of contract interpretation in the case, nor did it mention California Civil Code section 1646. It did argue that California's interests were paramount.

In none of its arguments to the District Court did Continental mount any constitutional contention.

C. The District Court's Ruling

The District Court, Presiding Judge Thelton E. Henderson, found there was no question that the language of the policy, which insured "all sums" with no punitive damages exclusion, provided for insurance of the punitive damages at issue. (App. 12a). Continental does not quarrel with that conclusion, confirming that this is not (as it never was) a case of contract interpretation, and

hence not a case involving California Civil Code section 1646.

Because of the apparent interests of the three states in the case, Judge Henderson analyzed California, Texas, and West Virginia law under California's "governmental interest" choice of laws test. (App. 6a).

The District Court first decided whether a conflict existed between the law of California on the one hand, and Texas and West Virginia on the other, with respect to the insurability of punitive damages.

The court looked to whether the Texas and West Virginia juries found Fibreboard liable for conduct which satisfied thresholds existing for punitive damages in those states, but which would not justify imposition of punitive damages in California, for if that was the case, California public policy would not prohibit insurance. It found the West Virginia award did not meet California's punitive damages standards, so California did not prohibit insuring it. Continental does not challenge that decision.

However, Judge Henderson found that under the pre-1987 California punitive damages rules, the Texas conduct would merit an award of punitive damages in California. The District Court did not address Fibreboard's point that the post-1987 punitive damages standards embodied California's current policy on insurability of such damages, and that California would *not*, under the new standards, punish Fibreboard on jury instructions anywhere near as loose as those used by the Texas court in *Cimino*. Were Fibreboard's point accepted, California law would not punish, and would not prohibit

insurance for, the conduct at issue here. Continental, then, would have no basis to urge there is even a choice of law issue, let alone a constitutional issue.

Because he found a true conflict between California and Texas, however, Judge Henderson applied the "comparative impairment" analysis of California's governmental interest choice of laws test. This required the court "to determine which policy is more significantly impaired by the application of the law of the other state. The law of the more significantly impaired state is to be applied." (App. 19a)

Judge Henderson found that the interests of Texas (where the cause of action arose and where the injured plaintiffs resided) would be more impaired by the application of the California rule against insurability of punitive damages, than would the interests of California (where the insured Fibreboard was headquartered and the policy delivered) be impaired by the application of the Texas rule. The court perceived that California had no interest in extending into other states California policies designed to protect its citizens (App. 20a). Rather, Texas had a greater interest in the policies it believed to be in the best interests of Texas citizens, such as promoting compensatory purposes behind its punitive damages rules (App. 22a). The court also recognized a California interest in applying its law to an insurance contract entered into in California, including the interest in promoting foreseeability as a matter of contract interpretation (App. 24a, 26a). But the California rule prohibiting insurance of California punitive damages awards was not adopted until 1979, and Continental's policy issued in

1957. Hence, the predominant interest was that of Texas, the place of the wrong (App. 26a, 27a).

Accordingly, Judge Henderson found Texas law governed insurability of the Texas awards, and under Texas law, they were insurable. He denied Continental's motion for summary judgment and, since there was no dispute as to material facts, entered judgment for Fibreboard.

D. Continental's Appeal to the Ninth Circuit

Continental appealed, rehashing the arguments it made to the District Court, and adding a claim that Judge Henderson's *application* of California's choice of laws test denied Continental due process because he did not conclude that California's interests were superior to those of Texas. Continental never attacked the constitutional validity of California's choice of laws test; indeed, Continental again invoked that test as compelling a result in its favor. After thorough briefing and oral argument, a unanimous panel of the Ninth Circuit ruled against Continental. The panel affirmed the District Court's ruling, endorsing the reasoning of Judge Henderson's opinion. (App. 29a)

Continental filed a petition for rehearing, and requested rehearing *en banc*. The same Ninth Circuit panel unanimously rejected Continental's petition. None of the judges of the Ninth Circuit voted to rehear the case *en banc* (App. 30a).

E. Continental's Petition to this Court

Continental's Petition presents for the first time a claim which it did not make to the District Court or to the

Court of Appeals, that state choice of laws rules which do not give paramount importance to the "reasonable expectations of the parties" are unconstitutionally unfair as examples of "formless interest balancing."

SUMMARY OF ARGUMENT

1. This case embodies none of the special and important reasons for certiorari. Continental did not even urge upon the Courts below the arguments it makes here. Continental does not support any of its claims that courts are using choice of law either to maximize liability of insurers or to render decisions denying due process. There is no need to "clarify" constitutional principles.

2. Continental argues that what it calls the "need to respect the reasonable expectations of the parties" should control the outcome in this kind of case. It offers no way to "respect" those expectations short of making place of contracting the constitutionally compelled choice of law rule. There is no basis for any such rule.

3. No confusion exists in the constitutional principles affecting choice of law rules to be clarified, certainly none relevant to this case. Due process requires only that a forum state's choice of laws not be arbitrary or fundamentally unfair. The court looks to the state interests involved. No one can plausibly claim that Texas lacked sufficient interest for its law to govern insurability of a Texas punitive damages award rendered in a Texas court for injuries to Texas citizens arising from distribution of products in Texas.

4. This is not a case where a court upset the parties' reasonable expectations, in an unconstitutional way or otherwise. An insurer who markets and sells business policies for nationwide coverage must expect that the laws of various states may apply and public policies of many states may bear on its obligations. Thus, Continental could not expect the local rules of any particular state to control all issues that might arise across the country. This is not a case where a court disregarded a policy provision, for the policy language beyond question covers punitive damages. Continental could have no reasonable expectation in 1957 that under California law punitive damages were not and never could be insurable in California, let alone in all the states in which claims against Fibreboard might arise.

ARGUMENT

I. This Petition and the Choice of Law Decision in this Case Do Not Present Any Special and Important Reasons for Review by Certiorari.

None of the illustrative reasons to be considered in determining whether to grant certiorari set forth in Rule 10.1, Rules of the Supreme Court of the United States, apply or are even claimed to apply here. Continental does not identify any conflict between decisions of the United States Courts of Appeal or between a high state court and a federal court of appeal. The Court of Appeals decided no important question of federal law (nor did the District Court) which should be settled by this Court. Nor does Continental identify any federal question decided in a

way that conflicts with applicable decisions of this Court. In truth, the District Court did not determine any federal question, constitutional or otherwise, because Continental put no such question to it. The Ninth Circuit Court of Appeals affirmed on the reasoning of the District Court.

In addition, before the Ninth Circuit, Continental never urged that use of California's choice of law rules, what it now terms "formless 'interest balancing' " (Petition 6, 16), denied due process or offended the Constitution in any other respect. At most, it argued almost as an afterthought that application of the rules to produce an insured award somehow violated due process. So it is that neither of the lower courts considered the contentions Continental now urges, because Continental did not make them. The question therefore is not fairly before this Court. *See O'Connor v. Ortega*, 480 U.S. 709, 729 (1987); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539, fn.5 (1985); *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956).

At least three times, Continental accuses courts, including the courts below, of using an interest balancing test as a way of maximizing insurance coverage (Petition 5, 13, 14). Not one case is cited as authority for, or as an example of this phenomenon. Certainly the opinion of Judge Henderson does not warrant Continental's accusation.

The remaining proffered reason for grant of certiorari is the claim that courts in insurance coverage cases frequently ignore actual and justifiable expectations of the parties in balancing relevant state interests (Petition 5). The courts below did not do so. Continental cites no

reported decision in which it believes that parties' expectations were ignored. In fact, it cites no case – other than its arguments about this one – to show any court has employed choice of law balancing tests to deprive an insurer of due process, despite its assertion, bereft of supporting authorities, that "constitutional limits are being routinely ignored" (Petition 19). Put simply, there is no wave of unconstitutional choice of law insurance coverage decisions inundating the country. Continental cannot point to even one.

Instead, Continental argues that courts reach divergent results in choice of law decisions involving insurance coverage for multi-state torts (Petition 15). It asserts that courts are faced with competing interests of respective states and differing insurance laws (Petition 16). Then it posits "acute confusion." This it says arises with some courts, according to Continental, routinely applying the law of the state where injury or pollution occurred, (Petition 16-17), with others picking a single state's law, albeit one of several choices, to determine insurance coverage obligations (Petition 17-18). Continental does not represent accurately what these courts are doing. Rather, a fair reading is that courts are applying choice of law tests, most often some type of interest analysis, and coming up with various results depending on the issues and the competing state interests involved.[1]

---

[1] *See, e.g. G. Heilman Brewing Co. v. Royal Group, Inc.*, 1991 WL 120366 (S.D. N.Y., June 21, 1991) (in environmental coverage action, Michigan (site of pollution) had greater interest than Maryland (insured's principal place of business and where policy issued) because Michigan, not Maryland, would suffer the long-term consequences of environmental damage); *Jones Truck*

Having posited "acute" and "prevailing" confusion, Continental makes the enormous leap. It invites this Court to step in (Petition 18). Nowhere does the Petition demonstrate *why* this Court should intervene. What Continental calls "confusion" is nothing more than the results different state courts reach in applying state rules in different contexts and arriving at appropriate rules of

---

Lines v. Transport Insurance Co., 1989 WL 49517 (E.D. Pa., May 10, 1989) (Missouri (site of insured's contaminated property) had a more significant interest than Texas (contract executed by insurer) or Arkansas (contract counter-signed by insured) in outcome of insurance coverage litigation); *Gilbert Spruance Co. v. Pennsylvania Manufacturers Ass'n. Ins. Co.*, 603 A.2d 61 (N.J. Super. 1992) (New Jersey (forum and place where pollution occurred) had dominant interest in protecting health and safety of its citizens and ensuring clean-up of its environment); *St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc.*, 777 P.2d 1259 (Kan. 1989), *cert. den.*, 493 U.S 1036 (1990) (Kansas (forum and where wrongful death occurred) applied its punitive damages insurability bar because it had stronger interest in protecting its citizens by deterring wrongful conduct within its borders than Delaware (where product manufactured)); *CPC Int'l., Inc. v. Northbrook Excess & Surplus Ins. Co.*, 739 F.Supp. 710 (D.R.I 1990) (in interpreting policy language, New Jersey (insured's principal place of business) has stronger interest in protecting its residents than Rhode Island (site of groundwater contamination)); *National Starch & Chem. Co. v. Great Amer. Ins. Co.*, 743 F.Supp. 318 (D.N.J. 1990) (to interpret various policy provisions, New Jersey (forum, where insured located, and place of majority of contaminated sites) has stronger interest in ensuring compensation of its residents and protection of its environment than New York (where insurer located and policy signed)); *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 390 S.E.2d 562 (W. Va. 1990) (West Virginia (forum and place where waste material originated, but did not contaminate) has slight interest in policy interpretation versus New Jersey (where insured headquartered and contract entered into)).

decision, all as contemplated by interest balancing. Federal courts sitting in diversity act no differently; they must apply the forum state's choice of law rules. *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487 (1941). Choice of law rules are and long have been a matter for state common law. *Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797, 823, 834 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307, (1981); *Kryger v. Wilson*, 242 U.S. 171, 176 (1916). There is no basis or reason for this Court to interfere with state choice of law rules, absent constitutional infirmities, which Continental does not reveal. Continental admits that variation in results of choice of law analysis is not a matter of federal concern (Petition 15), yet it shows no more than that. There is no reason to grant certiorari.

II. Constitutional Law Does Not Require Courts to Make Parties' Expectations Control Choice of Law Analysis, or to Freeze Choice of Law or Constitutional Rules at the Time a Contract Is Entered Into.

To conjure up a colorable constitutional claim, Continental must, and its Petition necessarily does, go to extraordinary lengths. It is true that when considering fairness in the context of the forum state's interest, an important element is the expectation of the parties. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985). Continental transmutes this into a "key factor" (Petition 5), then to the "primary constitutional factor" (Petition 19). Time and again it stresses the "need" to "respect" the "expectations of the parties." But what does that mean? For Continental, in this case, it means there is *one* factor, "*the* factor that should *control the outcome* in this kind of case – the need to respect the reasonable expectations of

the parties at the time they entered into the contract" (Petition 13; emphasis supplied). So it necessarily follows, according to Continental, that the "formless" interest balancing approach, employed by innumerable courts,[2] must be sacrificed in favor of the *controlling* factor, the parties' expectations. In short, Continental invites this Court to outlaw interest balancing in choice of law as violative of due process.

The Continental analysis actually is even more extreme, for it starts with the notion that those expectations (which must be "respected") include reliance on perpetual application of choice of laws rules thought to have been in vogue at the time the parties made the contract. Thus, Continental announces that in 1957, California courts read Civil Code section 1646 as mandating that California law govern all contracts performed or entered into in California.[3] Going even further, Continental

---

[2] And recognized by this Court as the dominant mode of choice of law analysis, as well as constituting the basis for due process inquiries. *Allstate Ins. v. Hague*, 449 U.S. 302, 308 and notes 10, 11.

[3] Authority Continental cites, *Wheeling v. Financial Indem. Co.*, 201 Cal.App.2d 36, 40-42, 19 Cal.Rptr. 879, 882-84 (1962) does not say that. It looked to California statutes to assess the validity of a California motor vehicle insurance policy, and held that statutes, requiring that such insurance cover any person using the vehicle, rendered invalid an exclusion for military drivers. *Wheeling* does not purport to hold that section 1646 controls all questions (particularly since the statute, by its terms, covers only interpretation), nor does *Wheeling* suggest or promise either that section 1646 would be construed forever to control choice of law on interpretation issues, or that its principles were constitutionally compelled. As Continental admits, recent California decisions do not read section 1646 literally

claims that *lex loci* principles in 1957 were viewed as constitutionally compelled (Petition 9-10).[4] From all this, Continental concludes that the parties' expectations included decisional law then in force (Petition 10). The logical result, and the only one that can lead to the outcome Continental needs, is to lock courts and parties into constitutional doctrine and choice of law rules of years ago, no matter how poorly they comport with modern thinking, all under the guise of "respecting" parties' expectations. Continental disclaims any thought that this would "federalize" choice of law or force a return to *lex loci* doctrine (Petition 15), yet that is exactly what its "need" to "respect" expectations would do. In effect, Continental's construct would "federalize" choice of law, in a way that imports into every contract, as a matter of due process, whatever conflicts rules existed when and where the contract was signed.

It is only by thus misdefining the law that Continental can claim that this Court's opinions may not have been sufficiently clear (Petition 19), or that courts are not heeding the message of the law as thus misdefined (Petition 5-6). No need for clarification arises just because this

---

(Petition 9, n.7). Nothing in the Constitution obliges California courts to read this California statute literally.

[4] It is a misreading of this Court's early cases to suggest that *lex loci* was ever a constitutional rule. Those cases simply did not permit a state with no, or minimal, interests to invalidate express terms of contracts made in other states where those terms were valid. *See discussion of Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) and *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), at §III, *infra*.

Court's decisions do not define the law or send the message Continental suggests, a subject to which we now turn.

III. Due Process Permits a Broad Scope of Choice of Law, and Application of a State's Laws That Is Not Fundamentally Unfair Is Perfectly Permissible.

Early cases of this Court held that a forum state may violate due process if it enlarges the obligation of an insurance contract beyond its terms by the device of invalidating a condition, valid in the state where made, if the forum state (1) has no connection with the contract, the subject of insurance, or the parties (save the nominal residence of the insured) (*Home Ins. Co. v. Dick*, 281 U.S. 397 (1930)), or (2) seeks to apply its law "regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract," *Hartford Acc. & Ind. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 150 (1934). Nothing like that happened here. The courts below did not nullify a term of a contract valid where made regardless of interests of the affected states. Continental's complaint is that the District Court refused to hold invalid Continental's promise to pay "all sums," because it concluded that California's public policy against insuring local punitive damages awards did not reach into Texas and control insurability of awards there. That decision, affirmed by the Ninth Circuit, was perfectly consistent with the due process jurisprudence this Court has developed.

Indeed, as Continental concedes, this Court has recognized that the Constitution permits application of the

law of more than one state, and has authorized choice of law of any state with sufficient contacts with a dispute (Petition at 7). That concession should end the matter, for no one can claim a lack of sufficient Texas contacts here. This Court's cases make that conclusion clear beyond doubt.

We start with *Watson v. Employers Liab. Assn. Corp.*, 348 U.S. 66 (1954). The insurance policy was negotiated and issued in Massachusetts (home of Gillette, the parent company) and delivered in Massachusetts and Illinois (where Toni, the subsidiary, was located). Laws of both those states recognized as binding and enforceable a policy clause that prohibited direct actions against the insurer until after final determination of the insured's obligation to pay plaintiff. Mrs. Watson, injured in Louisiana by a Toni permanent wave, sued under Louisiana's direct action statute permitting suit before such final determination. This Court reversed dismissal of her complaint.

The Court in *Watson* observed that some local contracts affecting nothing but local affairs may well justify denial to other states of power to alter those contracts (348 U.S. at 71). But, the Court pointed out, a vast part of the nation's business affairs do not present such simple local situations. The insurance contract, although issued in one state, was to protect the insureds against damages that might be suffered anywhere in the country (348 U.S. at 71-72). More than one state may regulate widespread business activities. Louisiana had a real interest in insurance policies designed to assure payment of damages to those injured in Louisiana, and in safeguarding the rights of persons injured there (348 U.S. at 72-73). This Court

concluded: "In view of that interest, the direct action provisions challenged here do not violate due process" (348 U.S. at 73).

There is just as much a constitutionally sufficient interest in applying Texas law to safeguard the interests of persons injured in Texas by products distributed in Texas, as Louisiana had in *Watson*. Certainly if Continental had sued in Texas, due process would not compel a Texas court to ignore Texas law, and to apply a California local rule applicable to California punitive damages awards under standards and for purposes different than those in Texas. The result cannot be different because Continental sued in California.

Later decisions established the test that a state's substantive law may be selected in a constitutionally permissible way if the state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary or fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality); *see* 449 U.S. at 326 (Stevens, J. concurring); 449 U.S. at 333 (Powell, J., dissenting with Chief Justice Burger and Justice Rehnquist). This Court affirmed the plurality formulation in *Phillips Petroleum v. Shutts*, 472 U.S. 797, 818 (1985).

By no stretch can it be said that Texas lacks sufficient contacts creating state interests such that choice of its law is arbitrary or fundamentally unfair. By comparison, in *Allstate Ins. Co. v. Hague*, the decedent lived in Wisconsin, the operators of both vehicles resided in Wisconsin, and the accident happened in Wisconsin. Yet Minnesota constitutionally applied its law, which permitted "stacking"

of uninsured motorist limits, based on decedent's employment in Minnesota, the insurer's doing business there, and post-accident residence by plaintiff, decedent's wife, there. Surely it cannot be argued, and Continental does not contend, that the aggregation of contacts consisting of 1) Texas location where products were distributed; 2) Texas residence of injured persons; 3) Texas courts which made underlying awards, and 4) coverage nationally by the insurance policy, are so insignificant and create such minuscule state interests as to make applying Texas law arbitrary or fundamentally unfair.[5]

Rather, Continental argues that the courts below frustrated its reasonable expectations, which, it asserts, should control the outcome. The authorities do not support Continental.

---

[5] Continental points out that *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924) held unconstitutional a Texas statute providing that an insurance contract payable to a Texan is a Texas contract, as applied to out-of-state parties (Petition 12, n. 13). It does not claim that the decision below ran afoul of *Dunken*. Nor could it, because the District Court did no more than rely upon a Texas case, *American Home Assur. Co. v. Safway Steel Prods. Co.*, 743 S.W.2d 693 (Tex.App. 1987), which, *inter alia*, cited the statute, simply to help identify the Texas interests at stake in the governmental interest analysis (App. 26a).

For the same reason, Continental's citation of *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865 (5th Cir. 1990) is unavailing. In addition, the insured in *W.R. Grace* settled and paid the plaintiffs, which meant the Texas interests "dropped out," leaving a contract interpretation dispute between a New York company and New York insurers where the governing law would be New York law. Hence, the Fifth Circuit ordered dismissal of the third-party action (896 F.2d at 872). That case did *not* involve questions of competing public policies as this one does.

IV. The Rulings Below Did Not Defeat Continental's Reasonable Expectations, Certainly Not in Any Constitutionally Significant Way.

A. Continental Could Have No Reasonable, Constitutionally Protected Expectation That California Law Always Would Apply In Every Case.

Watson v. Employers Liab. Assur. Corp., supra, does more than answer Continental's due process question as a matter of identifying adequate state interests. The opinion, rendered in 1954, put Continental on notice three years before it issued its policy to Fibreboard that insurance contracts, consistent with due process, will be subject to laws of states throughout the country which have interests of injured residents to safeguard. Surely Continental no longer could harbor a reasonable expectation that *lex loci* rules necessarily would govern, if indeed any such expectation ever had been reasonable. Three years before Continental wrote its policy, this Court announced that the law of place of injury could apply, based on the interest of that state, even where the result invalidated a contract clause valid where made. *See also, Hoopeston Canning Company v. Cullen* 318 U.S. 313, at 316-317 (1943).

In 1964, *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, applying a forum law which nullified policy clauses that required suit in less than five years, further demolished the premises of Continental's arguments. The Court pointed out that while the case law of Illinois, where the insured had purchased the policy, permitted shorter periods than prescribed by Illinois statute, no Illinois decision had extended the case law rule into other states. (Similarly, no California decision has extended its rule

governing insurability of California punitive damages awards into other states.) This Court saw "no difficulty whatever" under the due process clause. 377 U.S. at 181. Adopting the views of Justice Black in an earlier dissent, the Court pointed out that insurance companies sell to "customers who are promised protection in States far away from the place where the contract is made." 377 U.S. at 182. The point applies here. The policy in *Clay* did not even attempt to provide that Illinois law would govern when suits were filed elsewhere. *Id.* Neither did Continental include a choice of law clause. In our case, it cannot be said that contacts with Texas were "wholly lacking," or "too slight and too casual," which is how the *Clay* opinion characterized *Home Ins. Co. v. Dick* and *Delta & Pine Land Co. Id.*[6]

Allstate Ins. Co. v. Hague, supra, makes it even more clear that Continental can have no legitimate complaint that the rulings below defeated its reasonable expectations so as to violate due process. That case permitted Minnesota to apply its law allowing policy limits to be "stacked," whereas Wisconsin, the residence of the insured and place of accident, did not. The plurality pointed out that the insurer could not be certain Wisconsin law necessarily would control every accident which

---

[6] *Clay* and *Watson* cannot be distinguished on grounds they involved statutes creating narrow procedural exceptions to *lex loci* principles, as Continental tries to do (Petition 14, n. 15). *Clay* involved the same kind of time-to-sue clause as did *Home Ins. Co. v. Dick* and *Delta & Pine.* What happened is that this Court recognized the legitimacy of state interests in choice of law determinations. And it did so before Continental ever wrote the policy involved here.

occurred in Wisconsin. 449 U.S. at 316, n. 22. The insurer had a presence in the forum; it must have known it could be sued there, and that the forum might apply its law. 449 U.S. at 317-318. Similarly, Continental does not disclaim doing business in Texas.[7] Like Allstate who anticipated covered accidents nationwide for Mr. Hague because its policy offered coverage nationwide, Continental specifically anticipated that Fibreboard might suffer a loss in Texas or elsewhere in the United States, for its policy covered occurrences wherever they may happen, and named insureds listed in the policy included people and companies in Maryland and Colorado.

In his *Allstate* concurrence, Justice Stevens observed that the parties could make their expectations explicit by a choice of law clause or a clause specifically covering the point at issue. (Continental, of course, provided a policy whose language did cover the awards here at issue.) And Justice Stevens concurred that coverage of insured risks throughout the country showed the parties certainly could have anticipated that laws of other states would govern particular claims. 449 U.S. at 329. Again, the same is true here. The plurality, Justice Stevens, and the dissent (449 U.S. at 336) agreed that no reasonable expectations of the parties were frustrated. As in *Allstate*, "there is no

---

[7] Indeed, Texas case law seems to indicate that Continental has been selling insurance policies, as well as suing and being sued, in Texas for most of this century. *See, e.g., Continental Casualty Co. v. Wade* 105 S.W. 35 (1907), *Watts v. Continental Casualty Co.* 18 S.W.2d 591 (1929); *Continental Casualty Co. v. Swink* 329 S.W.2d 443 (1959); *Winn v. Continental Casualty Co.*, 494 S.W.2d 601 (1973); *Continental Casualty Co. v. Hall*, 761 S.W.2d 54 (1988).

element of unfair surprise or frustration of legitimate expectations as a result of [California's] choice of [Texas] law." (449 U.S. at 318, n. 24; plurality opinion).

It follows, we submit, that even if California law in 1957 prohibited coverage for punitive damages, Continental had no reasonable basis to assume that such a rule would apply throughout the country, wherever claims could be made and coverage questions adjudicated. The fact is, though, California had not enunciated any rule outlawing insurance for even local punitive damages awards by 1957, and it never has established such a rule for foreign awards, to this day.[8]

B. The Insurance Policy, Under California Law in 1957, Did Not Exclude Coverage for California Punitive Damages, And Certainly Not for Awards Rendered Elsewhere.

This is not a case like *Home Ins. Co. v. Dick*, or *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, where

---

[8] The courts did not actually begin to establish state policies on the insurability of punitive damages until the 1960's. *Northwestern Nat. Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1964), is generally regarded as seminal in stating the policy against insurability, while *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964), led the way in allowing insurability. At the time Continental issued its policy, only one state, Missouri, had even the rudiments of a policy precluding insurability. *Ohio Casualty Ins. Co. v. Welfare Finance Co.*, 75 F.2d 58 (8th Cir. 1934), *cert. den.* 295 U.S. 734. As noted above, California did not enunciate its policy until 1979 in *City Products Corp. v. Globe Indem. Co.*, 88 Cal.App.3d 31, 151 Cal.Rptr. 494. *See also*, 16 A.L.R.4th 11, especially sections 3-6 listing various states' positions.

the policies contained express provisions, and the question was whether laws of forum states with no significant connections to the transactions could nullify the parties' expectations as plainly set forth. The express "all sums" language of the Continental policy covers punitive damages. There is no other evidence of the parties' actual expectation, reasonable or not.

The Continental argument rests on a kind of legalistic, constructive expectations reasoning, which goes like this: The insurance policy incorporates the law, the law says the parties' expectations also include the law, so there was no need to include a California choice of laws provision or an exclusion of punitive damages, for the law did all of that for Continental anyway (Petition 10-11). The argument does not withstand analysis.

Continental could count on California choice of law rules governing only suits in California courts, under *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941). It had to anticipate that each state in which litigation could arise would apply its own choice of law rules. So, to start with even California choice of law rules as invariably controlling would not have been a justified expectation. And nothing compelled California to apply the law of place of contracting, especially in a case like this.[9] *Phillips Petroleum v. Shutts, supra,* at 838 (Stevens, J. concurring).

---

[9] Little need be said of Continental's argument that the parties by conduct showed they thought California law applied (Petition 11-12). The *In re Asbestos Coverage Cases,* in California, as respects Fibreboard, involved policy interpretation questions, not issues of choice of law as between public policies controlling insurability. This is not an interpretation case. Even

Equally important, this is not a case where parties' expectations can be gleaned readily from perusing pertinent law. There is no contract term here which takes its meaning from a code section as construed by a prior court decision, as in *California Ass'n. of Highway Patrolmen v. California Dept. of Personnel Admin.*, 185 Cal.App.3d 352, 229 Cal.Rptr. 729 (1980) (cited at Petition 10). Nor is this a case in which statutory law positively prescribed the scope of insuring provisions for policies delivered in California, as in *Jordan v. Consolidated Mut. Ins. Co.*, 59 Cal.App.3d 26, 37, 130 Cal.Rptr. 446, 452 (1976), or decisional law made an exclusionary clause invalid when the insurer delivered the policy, as in *Interinsurance Exchange v. Ohio Cas. Ins. Co.*, 58 Cal.2d 142, 146, 373 P.2d 640 (1962).

Rather, Continental must rely on a general provision, California Insurance Code Section 533, which provided: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Continental's "logic" is that section 533 barred coverage for willful acts, willful acts give rise to punitive damages, so punitive damages are barred from coverage by section 533 (Petition 10-11). Indeed, section 533 is the sole basis on which Continental contends that in 1957 punitive damages were not insurable. The fallacy in its reasoning is this: While willful acts could create liability for punitive damages, in 1957 punitive damages could also be awarded for something less culpable than willful acts.

---

if it were, the choice of law would not rise to the level of a constitutional inquiry.

Donnelly v. Southern Pacific Co., 18 Cal.2d 863, 869-70, 118 P.2d 465 (1941) (wanton and reckless misconduct justifies punitive damages); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 811, 174 Cal.Rptr. 348 (1981). In *Peterson v. Superior Court*, 31 Cal.3d 147, 158-59, 642 P.2d 1305 (1982) the California Supreme Court summarized established law as:

> "Nonintentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages when a party intentionally performs an act from which he knows, or should know, it is highly probable that harm will result. (*Nolin v. National Convenience Stores, Inc.* (1979) 95 Cal.App.3d 279, 286, quoting and explaining *Donnelly v. Southern Pacific Co.* (1941) 18 Cal.2d 863, 870 . . .)" (*Ford Motor Co. v. Home Insurance Co.* (1981) 116 Cal.App.3d 374, 381.) In those cases, section 533 is not applicable because the harm has not resulted from a "wilful act," thus only indemnification of the punitive damages portion of the recovery is prohibited.

Thus, not all punitive damages result from willful acts. It follows that a bar against insuring willful acts does not bar insuring all punitive damages.

In fact, the "reasonable expectations" analysis comes out the exact opposite of where Continental needs it to be in this case. That is because Continental never contended that section 533 applied to Fibreboard's conduct (if it did, it would prohibit indemnity for compensatory damages, too). If California Insurance Code section 533 constituted *the* bar to insurability of bad conduct in 1957, and Fibreboard's conduct did not trigger the bar of section

533, then the expectations were that *these* punitive damages *are* covered. The District Court was on firm ground in holding that it was not until 1979 that California adopted the rule against insuring California punitive damages awards, at least awards such as those in this case, with *City Products Corp. v. Globe Indemnity Co.*, 88 Cal.App.3d 31, 151 Cal.Rptr. 494 (1979).

As we pointed out above, in 1987 California tightened its punitive damages rules so that its current policy would be not to punish (and hence not prohibit insurability for) the conduct at issue in Texas. Continental winds up urging application of a California judge-made rule which (1) did not exist in 1957 when the insurance policy issued, (2) would not apply to the *Cimino* (Texas) awards in 1990, because the standards in *Cimino* did not then meet California standards, (3) never has been extended outside California to govern awards by juries in other states under less strict standards, and (4) is at odds with the coverage rule of the state of rendition. There can be no "reasonable expectation" of such a result to be respected.

CONCLUSION

Were it not for Continental's perceptions that the decisions below make it liable for a large sum of money, more than $300 million, and that it has nowhere else to go to avoid liability, this Court would never see this petition. Continental raised no constitutional or federal issues in the district court, and presented no substantial ones to

the Court of Appeals. There are no federal issues deserving review. This Petition lacks any merit. It should be denied.

Respectfully submitted,

KELLY C. WOOSTER*
JAYNE LOUGHRY
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
(415) 442-0900

*Counsel of Record

Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

No. 91-1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FIBREBOARD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) 1
City Products Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979) 4
Gombos v. Ashe, 322 P.2d 933 (Cal. App. 1958) 4
Home Ins. Co. v. Dick, 281 U.S. 397 (1930) 4
Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943) 4
Peterson v. Superior Court, 642 P.2d 1305 (Cal. 1982) 5
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 1
Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954) 4
W.R. Grace & Co. v. Continental Cas. Co., 896 F.2d 865 (5th Cir. 1990) 2

Statutes:

Cal. Ins. Code § 533 (West 1972) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1993

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FIBREBOARD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

Contrary to respondent's diversionary arguments, this case warrants review because of two undeniable facts. First, this Court has indicated that a central factor in due process review of choice-of-law decisions is the reasonable expectations of the parties. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1981) (Stevens, J., concurring); *id.* at 333 (Powell, J., concurring). Second, as this case illustrates, this factor is frequently ignored in the insurance-liability context: many courts are construing insurance policies under the laws of multiple states

(based on the locus of particular injuries), *see* Pet. 16-17 (citing cases), despite obvious reasons to doubt that the parties would have anticipated such an approach, *see* Pet. 17-18 (citing cases). If reasonable expectations should indeed have central importance in the due process analysis, the Court needs to reinforce that message in this case.

1. Respondent's efforts to evade further review begin with the suggestion that petitioner has raised a new issue in this Court. This suggestion is simply wrong. In the courts below, petitioner did devote much of its argument to state law, since choice-of-law questions are usually determined on that basis and since the applicable state choice-of-law principles, in its view, support application of California substantive law in this case. *See* Pet. 12-13. But petitioner also went further. In the district court, it argued that "[i]n 1957, the parties would reasonably have expected that California law would govern any contract dispute under traditional conflicts principles then in force." Mem. in Support of Summary Judgment at 11. It also relied on the Fifth Circuit's recent holding that application of Texas law to a dispute between an out-of-state insurer and an out-of-state insured over a loss in Texas "would raise serious questions of constitutionality under the . . . due process clause of the fourteenth amendment." *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 883 (5th Cir. 1990) (*per curiam* opinion on petition for rehearing) (quoted in Mem. in Support of Summary Judgment at 17-18).

In the Ninth Circuit, petitioner then devoted an entire section of its brief to the proposition that "The District Court's Application of Texas Law Violates Continental's Due Process Rights Because it Frustrates the Justifiable Expectations of the Parties." Appellant's Br. at 37.[1] Respondent now characterizes this argument as "almost . . . an afterthought," Br. in Opp. at 10, and makes the inex-

---

[1] Respondent never argued in the court of appeals that this issue was not properly preserved.

plicable claim that this argument is somehow different from the one presented here, *id.* In fact, however, petitioner's brief in the court of appeals relied on the same language in *Shutts* and *Allstate* that is cited here, for precisely the same purpose. There is thus no basis for the suggestion that Continental has now invented some new federal claim.[2]

2. Respondent also makes the hyperbolic claim that petitioner's constitutional analysis, based on the parties' reasonable expectations, would "outlaw interest balancing in choice of law as violative of due process." Br. in Opp. at 14. This is plainly incorrect. If parties entered into a contract at a time when interest balancing was the applicable approach to choice of law in states that might construe the contract, then such an approach would be wholly consonant with their expectations and would raise no constitutional concerns.

Here, however, as we have shown, we are dealing with a contract dating from 1957, when the traditional *lex loci* approach to choice of law was essentially universal. Petitioner's argument would indeed prevent departure from this traditional approach with respect to contracts *dating from this time period*, but that is simply a consequence of the need to respect parties' reasonable expectations. States would of course remain free to apply more recent approaches in cases where the parties cannot claim reliance on the traditional rule.

Respondent also suggests that any reliance on application of the law of the state where this contract was made and performed was misplaced even in 1957. Its sole support for this assertion, however, is the decision in

---

[2] It is true that the Ninth Circuit, by choosing to affirm on the opinion below, avoided addressing this constitutional issue, but this hardly means that petitioner is barred from pursuing the issue here. Nor does it mean that the case would provide an inappropriate vehicle for clarifying the applicable principles of constitutional law.

Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954), where this Court had upheld the constitutionality of a state *statute* mandating a narrow procedural exception to the *lex loci* doctrine—*i.e.*, authorizing accident victims to sue insurers directly despite contrary contractual language. As noted in the petition, Pet. 14, the Court had already drawn a distinction between contractual provisions governing "remedies and procedure," which the forum state could disregard, and provisions involving "rights and obligations" (such as the extent of the "risk" being insured), which were governed by the law of the state where the contract was made or performed. *Home Ins. Co. v. Dick*, 281 U.S. 397, 409-10 (1930). It is thus spurious to argue that *Watson* put anyone on notice that issues in the latter category might not be adjudicated in accordance with the *lex loci* doctrine.[3] And it is even more spurious to suggest that post-1957 decisions of this Court provided the requisite notice. *See* Br. in Opp. at 20-23.

3. Finally, respondent argues that petitioner should have known in 1957 that, even under California law, it was providing protection against the risk of punitive damages resulting from conduct that was wantonly reckless but not intentional. Br. in Opp. at 23-27. It does so by misstating the law as it then stood. In 1957, it was clear that California law limited punitive damages to cases involving "malice," *i.e.*, "an intent to vex, annoy or injure." *Gombos v. Ashe*, 322 P.2d 933, 939 (Cal. App. 1958) (citing 14 Cal. Jur. 2d § 176, at 810). *See also City Products Corp. v. Globe Indem. Co.*, 88 Cal. App. 3d 31, 41, 151 Cal.

---

[3] The only other pre-1957 case cited by respondent is *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313 (1943). *See* Br. in Opp. at 20. There the Court simply held that it was constitutional for New York to regulate insurance associations selling policies to New York residents covering New York property, even though the policies were executed elsewhere. It reasoned that the associations were doing business in New York and thus subject to general regulation. This decision said nothing about the constitutionality of construing insurance *policies* under the law of a state where the policies were neither made nor performed.

Rptr. 494, 500 (1979) (same). At that time, as now, insurance coverage for such an intentional act was expressly barred by statute. Cal. Ins. Code § 533 (West 1972). Petitioner thus had no reason to believe that it might be liable for punitive damages under this California insurance policy.

Much later, the law in California changed to allow punitive damages for acts involving "conscious disregard of the safety of others." *See Peterson v. Superior Court*, 642 P.2d 1305, 1312 (Cal. 1982). But that state simultaneously recognized that insurance coverage for punitive damages in such cases should still be barred as against public policy. *See id.* at 1310. This evolution hardly undermines petitioner's argument that (1) it reasonably expected the application of California law in 1957 and (2) it reasonably understood California law at that time to bar coverage for punitive damages. Nor does it suggest any reason why it would be fair now to apply the law of some other state and thereby create an obligation to indemnify respondent for punitive damages that was never part of the original deal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

* *Counsel of Record*

MOTION FILED
SEP 30 1992

No. 91-1993

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONTINENTAL CASUALTY COMPANY,
Petitioner,
v.
FIBREBOARD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO GRANT, VACATE AND REMAND ON GROUNDS OF MOOTNESS

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1993

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FIBREBOARD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION TO GRANT, VACATE AND REMAND ON GROUNDS OF MOOTNESS

A petition for a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit is currently pending in this case. The sole issue raised in that petition is the correctness of the Ninth Circuit's decision to apply Texas law in determining whether petitioner Continental Casualty was obliged to indemnify respondent Fibreboard Corp. for punitive damages awarded in one Texas civil case—*Cimino v. Raymark Indus., Inc.*, 86-0456-CA (E.D. Tex.). *See* Pet. App. 28a (specifying the relevant rulings that the Ninth Circuit affirmed).

That issue is now moot, because of a settlement reached in *Cimino* between petitioner Continental and the plaintiffs. In that settlement, Continental agreed to make various specified payments directly to the *Cimino* plaintiffs, who withdrew all other claims against Fibreboard

and Continental. This settlement was approved on September 25, 1992. The effect of this settlement is to moot the question of Continental's liability to Fibreboard for punitive damages previously awarded in *Cimino*.

It follows that the appropriate action for this Court to take at this time would be to grant a writ of certiorari, vacate the decision below, and remand for dismissal of this case, under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See, e.g., City Gas Co. of Florida v. Consolidated Gas Co. of Florida, Inc.*, 111 S. Ct. 1300 (1991); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 434 n.31 (citing examples).

Respectfully submitted,

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

* *Counsel of Record*

Supreme Court, U.S.
FILED
OCT 9 1992
OFFICE OF THE CLERK

No. 91-1993

In The

Supreme Court of the United States

October Term, 1992

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

FIBREBOARD CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO MOTION TO GRANT, VACATE REMAND ON GROUNDS OF MOOTNESS

KELLY C. WOOSTER*
JAYNE LOUGHRY
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
(415) 442-0900

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page(s)

CASES

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 3

Clarendon Ltd. v. Nu-West Industries, Inc., 936 F.2d 127 (3rd Cir. 1991) 5

Constangy, Brooks & Smith v. National Labor Relations Board, 851 F.2d 839 (6th Cir. 1988) 5

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 2

Duke Power Co. v. Greenwood Co., 259 U.S. 259 (1936) 4

Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979) 4

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 2

In re Memorial Hospital of Iowa County, Inc., 862 F.2d 1299 (7th Cir. 1988) 5

Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) 3

Karcher v. May, 484 U.S. 72 (1987) 4

Long Island Lighting Co. v. Cuomo, 888 F.2d 230 (2nd Cir. 1989) 5

National Union Fire Insurance Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989) 5

Northshore Development, Inc. v. Lee, 835 F.2d 580 (5th Cir. 1988) 5

United States v. Garde, 848 F.2d 1307 (D.C. Cir. 1988) 6

TABLE OF AUTHORITIES – Continued

Page

United States v. Generix Drug Corporation, 460 U.S. 453 (1983) 3

United States v. Munsingwear, 340 U.S. 41 (1950) . 3, 4, 6

United States v. W.T. Grant Co., 345 U.S. 629 (1953) 3

OTHER

13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3533.2 2

J. Moore, *Moore's Federal Practice* §416(6) 5

No. 91-1993

In The

Supreme Court of the United States

October Term, 1992

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

FIBREBOARD CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO MOTION TO GRANT, VACATE REMAND ON GROUNDS OF MOOTNESS

The action below was one for declaratory relief between a policyholder, Fibreboard Corporation, and its insurer, Continental Casualty Company. The issue was whether a District Court in California must apply California's public policy barring insurance recovery for California punitive damages awards to punitive damages awarded in other states which allow recovery. The case specifically involved punitive damages awarded against Fibreboard in a Texas class action (*Cimino v. Raymark Industries*) and a West Virginia consolidated action.

The District Court ruled in Fibreboard's favor, and the Ninth Circuit upheld the District Court. Continental

petitioned for a writ of certiorari, arguing that the lower courts' application of California's choice of law rules regarding the insurability of punitive damages awarded in the Texas class action violated due process. Continental's petition did not challenge either the lower court's finding that the insurance policy issued by Continental covered punitive damages, or its determination that Continental is obligated to indemnify Fibreboard for punitive damages awarded in the West Virginia consolidated action.

On virtually the eve of the Court's announcement of whether it has decided to grant or deny certiorari, Continental now attempts not only to avoid the Court's certiorari decision, but also to erase the lower courts' rulings.

According to Continental, the case is moot because it says it has reached a settlement with the plaintiffs in the *Cimino* Texas class action. **This** case has not settled at all. Fibreboard is not a party to the purported settlement of the *Cimino* case. On September 28, 1992, Continental's counsel informed Fibreboard's counsel that the Texas court was still reviewing related matters and that Continental expected signed orders shortly. The only order that Fibreboard is aware of reflects that the court has done no more than preliminarily approved the proposed settlement. Time to take any appeals from any such orders cannot have expired. The purported settlement cannot be sufficiently final as to render any part of this case moot. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465, fn.3 (1978); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371, fn.10 (1982); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.2, at 234-235.

However, even if Continental had reached a final settlement with the Texas class action plaintiffs in *Cimino*, such would not justify vacating the lower court decisions in this case, for the following reasons:

1. Continental's purported settlement with the Texas class action plaintiffs should be regarded as a voluntary cessation of Continental's denial of its obligation to indemnify Fibreboard for punitive damages awarded in Texas. The Court has repeatedly stated that mere voluntary cessation of a challenged practice does not moot a case. *See United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1983); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983). More important, Fibreboard has no assurance that Continental will not deny its obligations in the future. Fibreboard continues to face potential liability for punitive damages in asbestos-related lawsuits throughout the country, including in the State of Texas. If the Court vacates the lower court decisions, then Fibreboard may be deprived of the collateral estoppel and precedence of those decisions, while Continental will be free to reassert a coverage position which the District Court and the Ninth Circuit have already decided is wrong. "The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness." *United States v. Generix Drug Corporation*, 460 U.S. 453, 456 (1983).

2. Under the procedure described in *United States v. Munsingwear*, 340 U.S. 41 (1950), the Court may grant certiorari, vacate the decision below, and remand for dismissal of the case when the case becomes moot. "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment,

review of which was prevented through happenstance." Id. at 40 [Emphasis added.] Here, *happenstance* would not prevent review, rather it is Continental's own actions which would prevent review. Such actions do not make a case moot. *See Karcher v. May*, 484 U.S. 72 (1987).

3. Continental's purported settlement involves only the Texas class action. As noted above, the lower courts also found that the insurance policy issued by Continental covered punitive damages and determined that Continental is obligated to indemnify Fibreboard for punitive damages awarded in the West Virginia consolidated action. Continental has made no claim that these other issues are moot. In *Duke Power Co. v. Greenwood Co.*, 259 U.S. 259, at 267 (1936), the Court stated: "Where it appears upon appeal that the controversy has become *entirely* moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." [Emphasis added.] *See Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979) (quoted language cited approvingly). Continental chose to petition for certiorari as to only a part of the lower court decision, and it chose to abandon the sole issue of its petition by agreeing to pay off the *Cimino* plaintiffs, and, yet, it now seeks to have the decision vacated in its entirety. *Munsingwear* does not license appellants to manipulate the appellate process.

4. Continental brought this action for declaratory relief. It received an adverse decision, but one which determined its rights and those of Fibreboard, which is the sole purpose of a declaratory judgment. Now it seeks, in effect to wipe out the collateral estoppel and *stare decisis* effect of the very decision it sought, not by settling

the issues in this case with Fibreboard, but by promising to pay a large sum of money to other parties, the *Cimino* Texas class action plaintiffs.

The majority of the Courts of Appeals takes the position that vacatur is not appropriate where mootness is attributable to the deliberate actions of the litigants, even more particularly where it is the actions of the party who lost below. *See Long Island Lighting Co. v. Cuomo*, 888 F.2d 230 (2nd Cir. 1989); *Clarendon Ltd. v. Nu-West Industries, Inc.*, 936 F.2d 127 (3rd Cir. 1991); *Northshore Development, Inc. v. Lee*, 835 F.2d 580 (5th Cir. 1988); *Constangy, Brooks & Smith v. National Labor Relations Board*, 851 F.2d 839 (6th Cir. 1988); *National Union Fire Insurance Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989). *See also* J. Moore, *Moore's Federal Practice* § 416(6), at 543-544.

As Circuit Judge Easterbrook stated for the 7th Circuit:

> Litigants who settle their dispute while an appeal is pending often file a joint motion asking us not only to dismiss the appeal but also to vacate the opinion and judgment of the district court. We always deny these motions to the extent they ask us to annul the district court's acts, on the ground that an opinion is a public act of the government, which may not be expunged by private agreement. History cannot be rewritten. There is no common law writ of erasure.

In re Memorial Hospital of Iowa County, Inc., 862 F.2d 1299, 1300 (7th Cir. 1988).

Judge Easterbrook's words apply with even greater force here where one of the parties – Fibreboard – is not a party

to the settlement and had no involvement whatsoever in the effort to manufacture mootness.

As another Circuit, in *United States v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988), recognized:

> The distinction between litigants who are and are not responsible for the circumstances that render the case moot is important. We do not wish to encourage litigants who are dissatisfied with the decision of the trial court 'to have them wiped from the books' by merely filing an appeal, then complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision.

If the Court were to grant Continental's motion it would encourage others to use *Munsingwear* as a writ of erasure.

For the foregoing reasons, Fibreboard respectfully asks the Court to deny Continental's motion.

Respectfully submitted,

KELLY C. WOOSTER*
JAYNE LOUGHRY
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
(415) 442-0900

*Counsel of Record

Supreme Court, U.S.
FILED
OCT 16 1992
OFFICE OF THE CLERK

No. 91-1993

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONTINENTAL CASUALTY COMPANY,
Petitioner,
v.
FIBREBOARD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF MOTION TO GRANT, VACATE AND REMAND ON GROUNDS OF MOOTNESS

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1993

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FIBREBOARD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF IN SUPPORT OF MOTION TO GRANT, VACATE AND REMAND ON GROUNDS OF MOOTNESS

Several points made in respondent's opposition to petitioner's motion to grant, vacate and remand on grounds of mootness warrant a brief reply.

First, respondent is factually incorrect in asserting that the settlement in *Cimino* was only preliminarily approved. The *Cimino* court has entered a *final* order approving the settlement, and petitioner has begun making payments pursuant to that settlement.[1]

It follows that the issues raised in the petition are moot. Petitioner is fully obligated to pay the sums required by the settlement to the *Cimino* plaintiffs, thus

---

[1] Attached here is the *Cimino* district court's Amended Order, dated October 9, 1992. An earlier approval order was withdrawn because of various technical errors in the court's order and findings.

ending the dispute over its liability to indemnify Fibreboard for the damages originally awarded in that case. Fibreboard's third-party complaint against Continental in *Cimino*, in turn, has been dismissed.[2]

It is true that there are other unrelated aspects of the decision below that were not challenged in the petition for certiorari, involving petitioner's liability for damages awarded in West Virginia. We ask only that the Court vacate the part of the Ninth Circuit's decision relating to liability for punitive damages awarded in Texas—the issue raised in the petition.

Finally, there is no merit to respondent's argument that the Court should deny the request to vacate the decision below because the mootness resulted from petitioner's voluntary action in entering into the *Cimino* settlement. As noted in our motion, the Court has followed a consistent practice of vacating and remanding cases that become moot during the pendency of a petition for certiorari. *See* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 434 (arguing against a change in this practice). Moreover, while some circuits follow a different approach where mootness results from a settlement, this Court should not recognize such an exception. *See id.* at 238-41 (Supp. 1992) (criticizing these circuit rulings).

Petitioner, faced with enormous liability as a result of the decision below, reasonably took advantage of an opportunity to limit the damage through the *Cimino* settlement. In so doing, it passed up its opportunity to obtain Supreme Court review of the merits of the Ninth Circuit's decision. There is no justification for requiring a settling party to live with the permanent preclu-

---

[2] Out of a class of approximately 2300, there were only three objections to the settlement, one of which was withdrawn. Respondent cites no authority for the proposition that the remote possibility of a successful appeal by the two remaining objectors undermines the mootness of the petition.

sive effects of a decision that has not been subject to the full appellate process in order to reach a settlement while review is still being sought. Such a rule will only deter settlements in pending cases. *See id.*

Respectfully submitted,

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

* Counsel of Record

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-86-0456-CA
(Class Action)

CLAUDE CIMINO, *et al.*

vs.

RAYMARK INDUSTRIES, INC., *et al.*

AMENDED ORDER

[Filed Oct. 9, 1992]

Consistent with the Amended Findings of Fact and Conclusions of Law signed by the court on October 9, 1992, the court, having heard counsel, having considered the objections, and having reviewed all submissions presented with respect to the proposed settlement, and upon the entire record and docket herein, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. The proposed settlement, as provided for by the Settlement Agreement on file, is in all respects fair, adequate, reasonable, and reached in good faith, and is approved.

2. Notice to the class, required by Rule 23(e) of the Federal Rules of Civil Procedure, has been given in an adequate and sufficient manner, complying in all respects with such Rule and due process.

3. Plaintiffs and Continental Casualty Company shall consummate the settlement according to the terms of the Settlement Agreement.

4. The proposed individual payments to the plaintiffs set forth in Attachments A and B to this Order are approved; recognizing the contingencies involved, the court also approves the terms of the settlement whereby plaintiffs may recover amounts less than those individual amounts. The cash payments, which represent 10 percent, 7.535% and 7.533%, respectively, of the total maximum possible settlement, are also approved. These cash payments by Continental will be made proportionate to allocations to pre-1959 plaintiffs as set forth in Attachments A and B. The proposed allocations of the settlement amounts, as set forth in the Amended Findings of Fact and Conclusions of Law are approved. The court notes that the amount of payments to post-1959 claims cannot be set with exactitude at this time due to the effect of the calculation of interest.

5. This Order is a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and the court finds that there is no just reason to delay appeal. The Clerk of Court is directed to enter this Order as a final judgment of this court.

6. The claims of each of the plaintiffs against Fibreboard Corporation are dismissed with prejudice.

SIGNED this the 9th day of October, 1992.

/s/ Richard A. Schell
RICHARD A. SCHELL
United States District Judge